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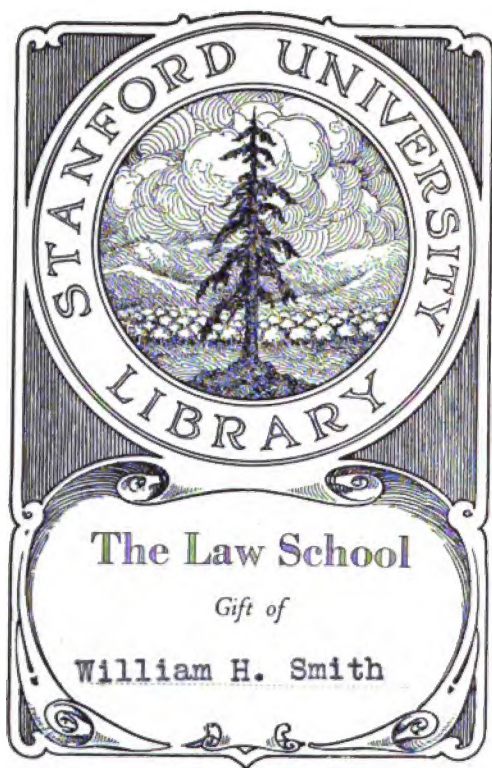
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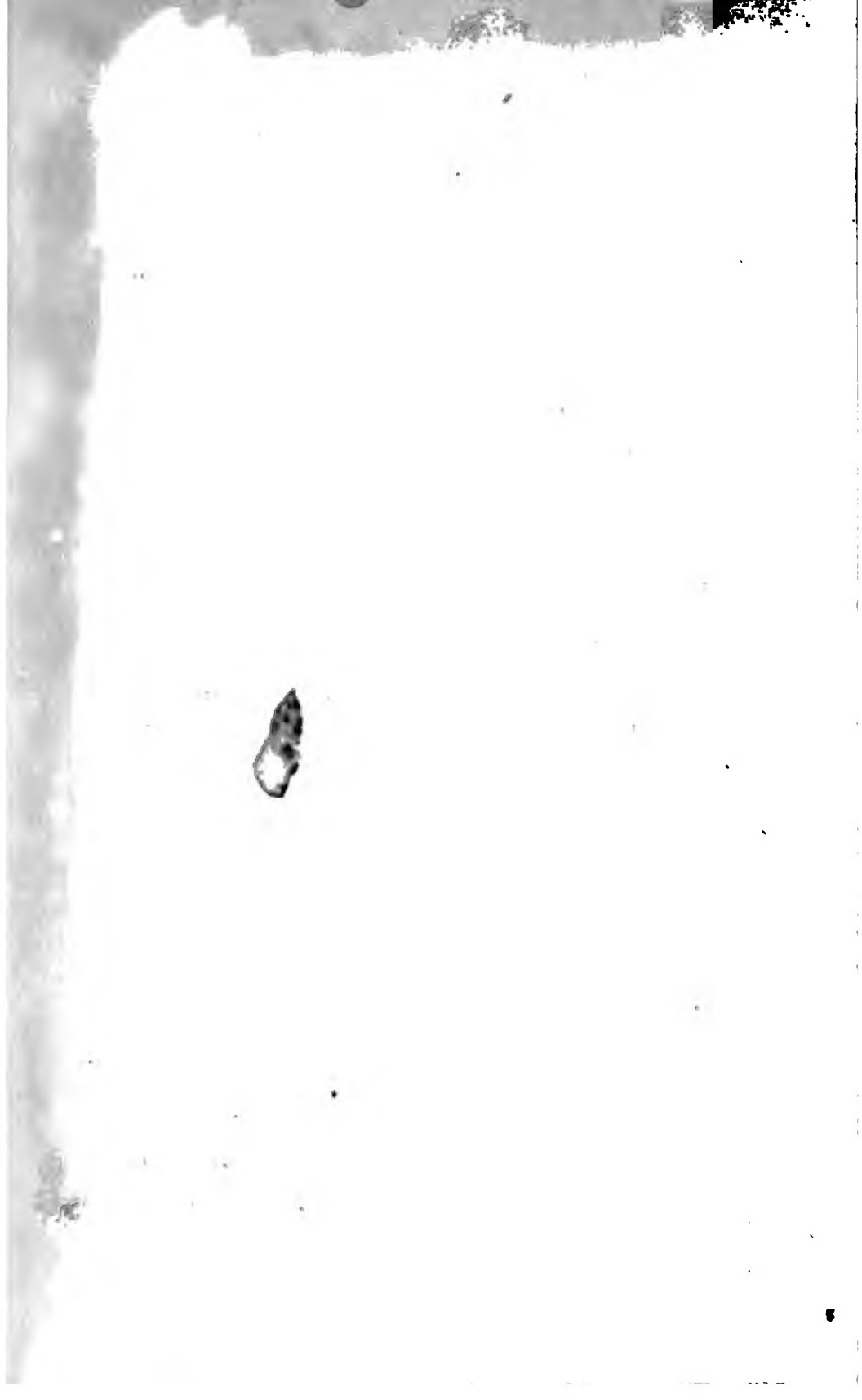
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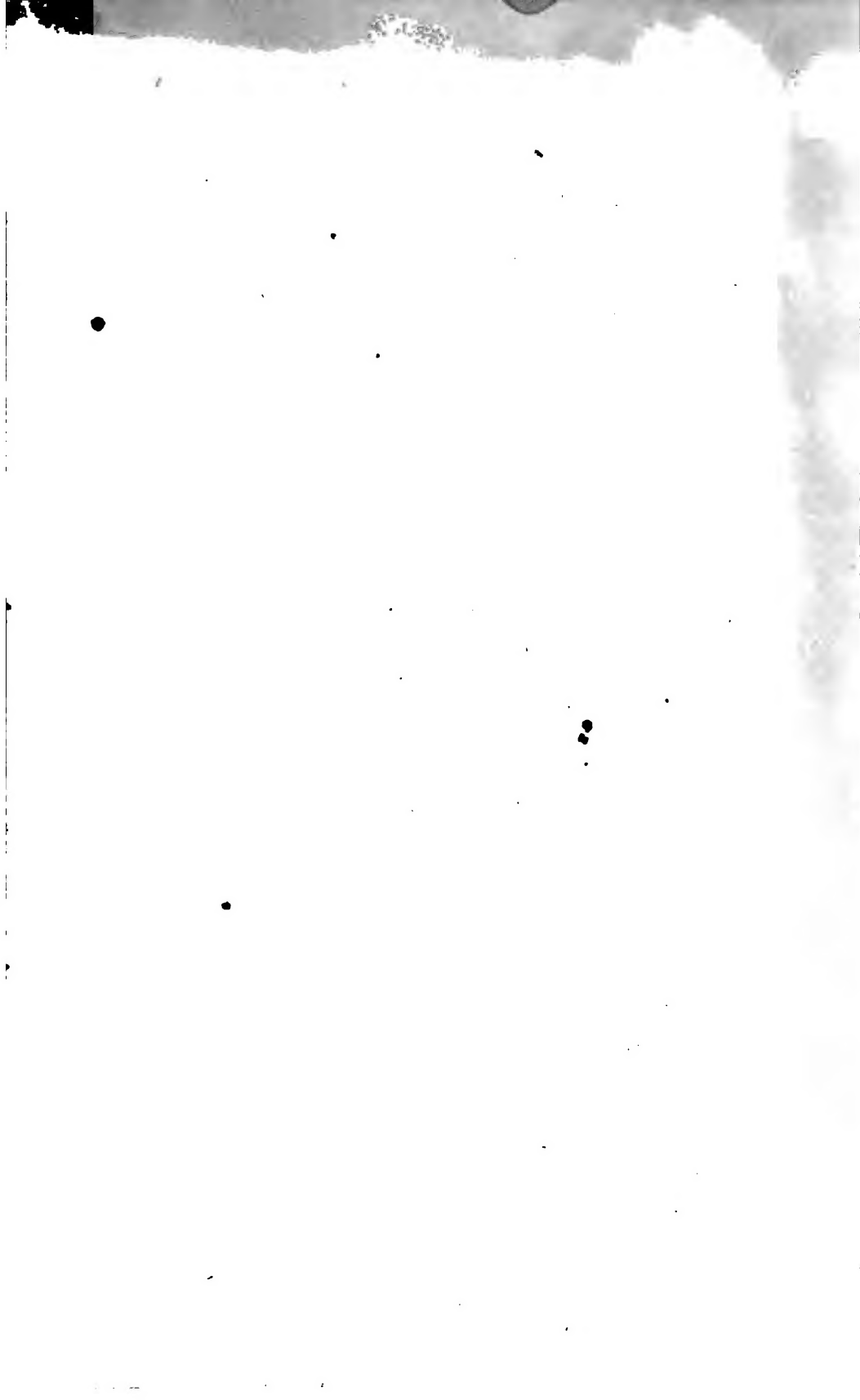


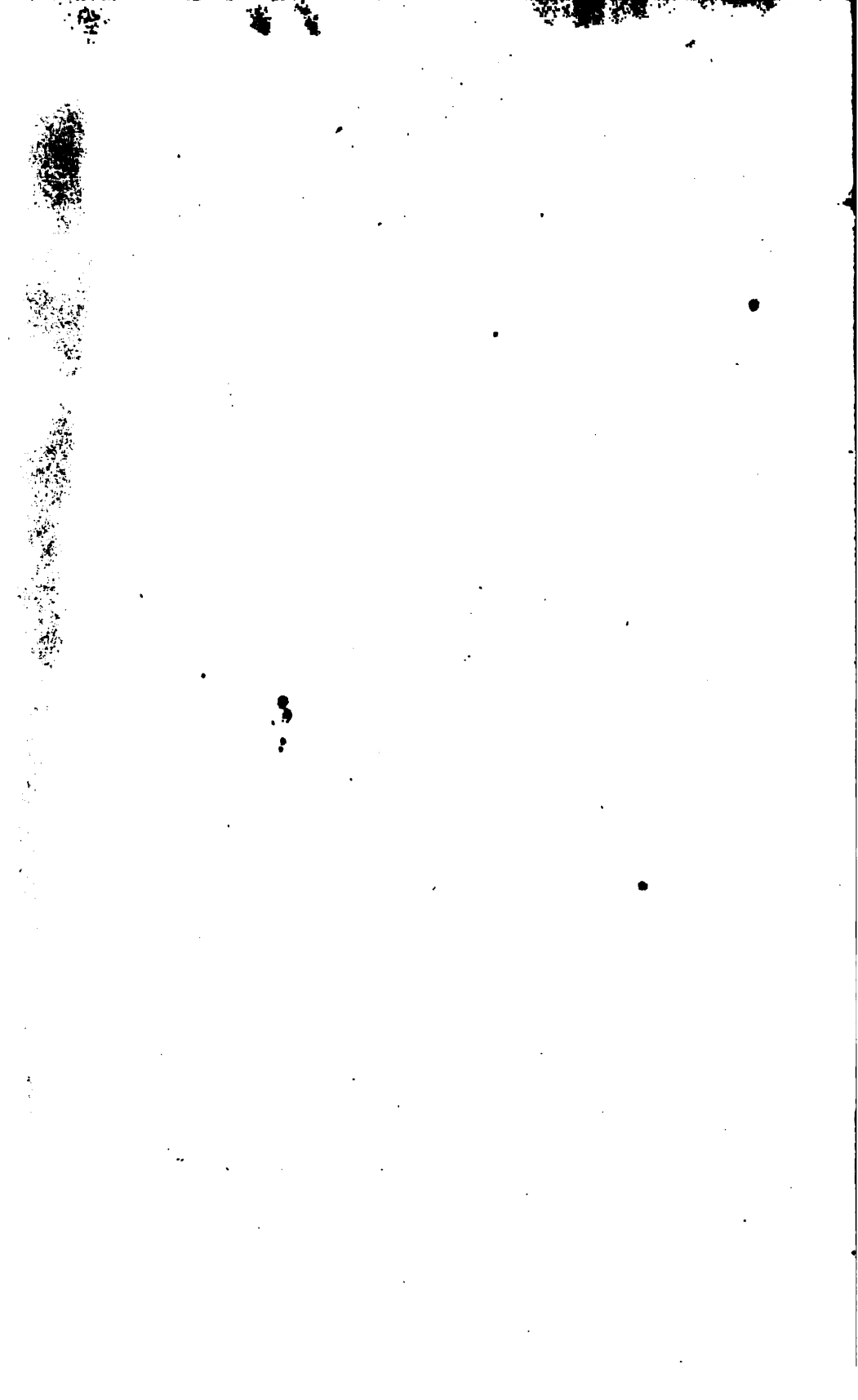


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**THE LAW**  
**OF**  
**PLEADING AND EVIDENCE**

**IN CIVIL ACTIONS,**  
**ARRANGED ALPHABETICALLY:**

**WITH**  
**PRACTICAL FORMS:**

**AND THE**  
**PLEADING AND EVIDENCE TO SUPPORT THEM.**

**BY JOHN SIMCOE SAUNDERS, ESQ.**  
**BARRISTER AT LAW.**

**FOURTH AMERICAN EDITION, WITH CONSIDERABLE ADDITIONS.**

**BY A MEMBER OF THE PHILADELPHIA BAR.**

**VOLUME II.**

**STANFORD UNIVERSITY**  
**PHILADELPHIA:**

**ROBERT H. SMALL, LAW BOOKSELLER, MINOR STREET.**

**1844. Ransford Smith.**



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GROUPE

# PLEADING AND EVIDENCE:

WITH

## PRACTICAL FORMS.

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### \*FALSE IMPRISONMENT.

[\*515]

FORM OF REMEDY, 515.

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EVIDENCE FOR DEFENDANT, 521.

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#### *Form of Remedy.*

TRESPASS is the only remedy for an illegal imprisonment, when not done under colour of legal process : 11 Mod. 180. It is the form of remedy, also, when the imprisonment was in the first instance legal, but the deft., by an excess of authority, or violence, becomes a trespasser *ab initio*: Co. D. *Trespass*, C. 2. It lies for the wrongful imprisonment after the process is determined, Cro. J. 379. If the imprisonment took place under colour of a legal proceeding, the plt.'s only remedy is by action on the case, for the malice, if, indeed, there was malice: see *post*, "*Malicious Arrest*;" and see, further, as to the form of remedy for an injury done under colour of process, *post*, "*Trespass*."

#### *Form of Pleadings.*

*Declaration.*] The venue in this action, as in other personal actions, is transitory, and may be laid in any country; if the imprisonment happened abroad, the place where it occurred should be laid, with a *videlicet*, thus: "at Fort St. George, in the East Indies, to wit," "at Westminster, in the county of Middlesex:" *Mostyn v. Fabrigas*, 1 Cowp. 161. As to the venue, in actions against justices of the peace, and constables, &c., see "*Justice of the Peace*," "*Officer*." The other points as to the declaration will be found, *post*, "*Trespass*," *ante*, 94, "*Assault and Battery*."

*Plea.*] The rules as to pleas in general will here prevail: *post*, "*Plea*," "*Trespass*." The general issue is, not guilty. Matter in justification of the imprisonment must be pleaded specially, showing that the imprison-

ment was lawful, except in those cases where the party is enabled, by some stat., to give the matter in evidence under the general issue; for it is a rule, that, where the act would, at common law, *prima facie* appear to be a trespass, any matter of justification or excuse, or done by virtue of a warrant or authority, must, in general, be specially pleaded: 2 Camp. 378, 500; Co. Lit. 282, *b.*; 2 Saund. 298, *n.* 1; Com. D. *Pleader*, E. 15, 16. And this, among other reasons is to prevent the plt. from being taken by surprise at the trial, and then assigning various grounds for imprisoning the plt. of which he had no notice; 3 Wils. 370, 1; Co Lit. 282; and see, further, *post*, "*Trespass, Pleas in.*" A constable may justify under the general issue, although he acted without warrant, provided there were a reasonable charge of felony made, although he afterwards discharged the prisoner, without taking him before the magistrate, and although it eventually appear that no felony was committed; but a private person who makes the charge, and puts the constable in motion, cannot justify under the general issue, but must plead specially: *McCloughan v. Clayton*, Holt, C. 478; 7 Jac. 1, c. 5; 21 Jac. 1, c. 12. Where the party makes the charge, obtains a warrant, and assists the officer, he may de-  
 [\*516] fend under \*the general issue: 3 Camp. 257. It is, in general, not advisable for the officer to join in the plea: 2 Bing. 523.

The special plea must admit the trespass, and where, to an action for false imprisonment, brought by A. against B., C. and D., they pleaded a plea of justification under process, wherein B. said, that he, as attorney for the plt. in the original action, delivered the warrant made by the sheriff upon the process, to C. and D., as his bailiffs, to be executed in due form of law, and that C. and D. thereupon arrested the plt. A., and detained him in prison,—this was holden to be a sufficient admission by B. of the trespass, for the purpose of his justification; for he who commands or directs another to do a trespass is guilty of the trespass, if done by the other person, pursuant to his direction: Willes, 14. The deft. must show that he imprisoned plt. by lawful authority, and such authority must be shown: 1 Inst. 283. There is a difference, however, in this respect, where the justification is under judicial process between the party of the cause, or a mere stranger, and the officer who executes the process of the court; the party to the cause, or a mere stranger, must set forth, in their plea, the judgment, *per Holt, C. J., Britton v. Cole*, Carth, 443, as well as the writ; but the officer need only show the writ, 1 Lev. 95, 3 *ib.* 20, under which he acted, for he is bound to execute the process of the court, having competent jurisdiction, without inquiring after the judgment. And it is to be observed that, where the party to the cause and the officer join in pleading, the plea must contain all the requisites which would be necessary in case they had pleaded separately, Str. 509; for it is a general rule, that, where two or more join in a defence, although the justification may be sufficient for one or more, yet, if it be not sufficient for the rest, it will be bad as to all the defts. In justifying under process of inferior courts, a greater strictness is required, Willes, 37; thus, the nature and extent of the jurisdiction of the court below ought to be set forth, and that the cause of action below arose within the jurisdiction of the court below: *ib.*; 4 Taunt. 50; Willes, 689. Merely stating, in the plea, the declaration in the court below, which contained an averment that the cause of action arose within the jurisdiction, is not sufficient: 3 Lev. 343. It is not necessary to set forth, in such plea, the proceedings at length in the inferior court, 3



Lev. 403, Cowp. 18; but if the party justify under a *capias*, a precedent summons ought to be set forth, Willes, 38; or it should be shown by indictment or otherwise, that such summons had issued; Willes, 688, 38, n. If the plea justify a trespass under the process of a foreign court, it seems that it should be formed in analogy to similar justifications under the process of our inferior courts; but, at any rate, a plea which only states that the court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum*, &c., that the deft. was ordered by the same court, having competent authority in that behalf, to seize the property is bad, as being too general, and not giving the plt. notice whether the deft. justified as an officer of the court or party to the cause, or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or *quousque*, &c.: *Collett v. Ld. Keith*, 2 East, 260; and see in general, 2 S. N. P. 887, 8.

A plea, justifying an arrest by a private person on the grounds of suspicion of felony, must show the grounds of such suspicion: *Mure v. Kaye*, 4 Taunt. 34; 5 Price, 525. It is for the court to judge whether there was reasonable cause for suspicion, *ib.*; 8 Taunt. 182; 2 Moo. 80, s. c. [see *Hall v. Booth*, 3 Nev. & M. 316.] In a plea of justification by an officer, care must be taken to state his appointment accurately: 7 East, 174. If a constable plead, specially, a justification of an imprisonment, without a warrant for a breach of the peace, it seems necessary to aver that he had *view* of the breach, it having been decided that a constable cannot arrest for an affray out of his *\*view* without a warrant, except a felony is likely to ensue: 3 Chit. Pl. 1078, n., and cases there cited. [\*517]

If a plea of justification consist of two facts, each of which would, when separately pleaded, form a good defence, it will sufficiently support the justification, if one of these facts be found by the jury, *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

[A plea which professes to justify several assaults and imprisonments laid in separate counts, must show distinct occasions upon which the defendant was justified in committing each particular trespass. *McCuraay v. Driscoll*, 1 C. & Mees. 618; 3 Tyr. 571, s. c. So the plea should answer the entire charge in the declaration. Thus, a declaration for an assault in seizing the plaintiff, dragging him about, striking him, forcing him out of a field into and through a pond, and then imprisoning him, would not be answered by a plea, justifying the assaulting, seizing, and dragging the plt. about: *Bush v. Parker*, 1 Bing. N. C. 72.]

*Replication.*] The general rules as to replications in trespass will here prevail: *post*, "*Trespass*." If the deft. justify as constable, and without warrant taking the plt. for a breach of the peace, or under public act of Parliament, or under a right for all persons given by the common law, Com. D. *Pleader*, F. 18; 12 Mod. 580, 2, or if the deft. justify under process of a court not of record, the general replication, *de injuria*, is sufficient, all making matter of fact, and making but one cause: *ib.*; 6 Co. 67, a.; 1 Chit. Pl. 527. But if the deft. justify by warrant of a justice of the peace, the replication must be special, and must admit or protest the war-

warrant, and reply *de injuria* as to the residue, or take issue simply on the warrant, *ib.*; and, where the justification is under a writ, warrant, or other process of a court of record, the plt. must not reply *de injuria* generally, putting the whole of the plea in issue, 6 Co. 67, *a.*, Com. D. *Pleader*, F. 19, 20; but must, according to the facts of such particular case, either deny the issuing of the writ or making of the warrant, 1 Saund. 299, *b.*, or protest the writ or warrant, and reply *de injuria* as to the residue; or, if the parties have been guilty of any illegal conduct, as under violence, or an imprisonment before the issuing or after the return of the writ, the plt. should reply the facts, or new assign: *ib.*; 1 Chit. Pl. 513. Where the deft. justifies the imprisonment under a commitment, as a magistrate, for a bailable offence, in consequence of an information upon oath, the plt. under the general replication *de injuria*, cannot give in evidence a tender and refusal of bail, but ought to reply that matter specially: 2 W. Bl. R. 1165. If an action be brought for detaining the plt. in prison from such a day to another, and deft. plead, as to part, "not guilty," within four years, plt. may reply that it was one continued imprisonment, and so oust the deft. of the benefit of the statute: *Coventry v. Apsley*, Salk. 420.

### Precedents.

DECLARATION FOR FORCING PLT. OUT OF A HOUSE, TEARING HIS CLOTHES, AND IMPRISONING HIM IN A WATCH-HOUSE, AND AFTERWARDS TAKING HIM TO A POLICE OFFICE.

Ellenborough.

Trinity Term, 9 Geo. 4.

Middlesex, (*venue transitory*) to wit. C. S. complains of H. T., A. S., and T. L., being, &c. (*see commencement in K. B. and C. P., ante 420.*) of a plea of trespass, for that the said deft.'s on, &c., (*the day of imprisonment, or any day about the time.*) with force and arms, assaulted the said plt., to wit, at, &c. (*venue.*) and then and there seized and laid hold of the said plt., and with great force and violence (*let the statement be according to the facts of the case—stating it more aggravating than it really was, is not advisable.*) pulled and dragged about him, the said plt., and gave and struck him a great many violent blows and strokes, and also then and there cast, pushed, and threw, the said plt. down divers stairs, and trod, and trampled, and jumped upon him, the said plt., and then and there dragged the said plt. through and along divers passages, and cast and threw him into the public streets there and then, and there rent, tore, damaged, and destroyed, the clothes and wearing apparel, to wit, one coat, one pair of stockings, and one hat, of the said plt., of great value to wit, of the value of £20 which he, the said plt., then and there wore and was clothed with; and, also, then and there forced and compelled the said plt. to go in and along divers public streets and places to a certain watch-house in the county aforesaid (*be accurate.*) and then and there imprisoned

the said plt., and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to \*wit, for the space of twelve hours then next following; at the expiration whereof, to wit, on, &c., aforesaid, at Westminster aforesaid, in the county aforesaid, the said defts., with force and arms, again assaulted the said plt., and forced and compelled him to go to a certain public police-office, in Bow Street, in the county aforesaid, and there again imprisoned the said plt., and kept and detained him in prison there for divers, to wit, three hours, then next following, under divers false and unfounded charges and pretences, contrary to the laws and customs of this realm, and against the will of the plt. By means of which said several premises, one of the knee-caps of the said plt. was then and there put out, and the said plt. was then and there greatly bruised and wounded and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time, he, the said plt., thereby then and there suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business, by him, during that time, to be performed and transacted. (*If plt. was obliged to pay any*

*doctor's bill, or sustained any other special damage, add an averment to meet same: see ante, "Assault." Add a common count for a false imprisonment, as next precedent; also, a count for a common assault, as ante, 99. See form of conclusion, ante, 420.)*

## COMMON COUNT FOR FALSE IMPRISONMENT.

And, also, for that the said deft., on, &c. with force and arms, &c., made another assault upon the said plt., to wit, at, &c. and then and there beat, bruised, and ill-treated him, the said plt., and then and there imprisoned him, the said plt., and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long time, to wit, for the space of — hours then next following, contrary to the laws and customs of this realm, and against the will of the said plt. (*Add a count for common assault, as ante, 99, and conclude as ante, 420.*)

See form of plea of general issue, *post*, "trespass."

## PLEA JUSTIFYING IMPRISONING PLT. FOR A BREACH OF THE PEACE.

(*Actio non.*) Because he says that, just before the said time, when, &c., in the said first count mentioned, to wit, on the same day and year aforesaid, at, &c., aforesaid, the said plt., with force and arms, &c., made an assault upon the said deft., and beat and ill-treated him, and thereupon the said deft. then and there gave charge of the said plt. to a certain peace-officer of our said lord the king, who then and there had view of the said breach of the peace of our said lord the king, so committed by the said plt., as aforesaid, and requested the said peace-officer to take the said plt. into his custody, and carry him before some justice or justices of our said lord the king, assigned to keep the peace in and for the said county of —, to answer the premises, and to be examined and dealt with according to law; and the said peace-officer, at such request of the said deft., and the said deft., in the aid and assistance of the said peace-officer, then and there gently laid their hands upon the said plt. in order to take, and did then and there take, the said plt. into the custody of such peace-officer, and kept and detained him so in custody until the said plt. afterwards, and as soon as conveniently could be, was carried before one of his majesty's justices, assigned to keep the peace in and for the said county of —, for examination concerning the premises, and to be dealt with according to law; and, on that occasion, the said plt. was necessarily and unavoidably imprisoned, and kept and detained in prison for the said space of time in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plt. hath above thereof complained against him, the said deft. And this, &c. (*Conclude with a verification, as post, "Plea."*)

## PLEA JUSTIFYING AN ARREST, &amp;C. UNDER A LATITAT, AGAINST PLT.

(*Actio non.*) Because they say that, before the said time, when, &c., in the said first count mentioned, to wit, on, &c. a certain writ of our lord the now king, commonly called a latitat, was issued out of the court of our said lord the king, before the king himself, at Westminster, in the \*county of Middlesex, directed to the then [ \*519 ] sheriff of —, by which said writ our said lord the king commanded the said sheriff that he should take the said plt. and R. Roe, if they should be found in his bailiwick, and keep them safely, so that he might have their bodies before our said lord the king, at Westminster aforesaid, on, &c. to answer to the said E. F. in a plea of trespass, and also to a bill of the said E. F., against the said plt. for £— upon promises, according to the custom of the said court of our said lord the king, before the king himself to be exhibited, and that the said sheriff should have there then that writ: which said writ was then and there duly indorsed for bail for £— according to the form of the statute in such case made and provided, and which said writ, so indorsed for bail, as aforesaid, afterwards, and before the return thereof, and also before the said time, when, &c., to wit, on, &c., at, &c., aforesaid, was delivered to G. H. Esq., who then and from thenceforth, until, and at, and after the return of the said writ, was sheriff of the said county of —, to be executed in due form of law; and thereupon the said G. H., so being sheriff, as aforesaid, afterwards, and before the return of the said writ, and before the said time, when, &c., in the said first and second counts mentioned, to wit, on the same day and year last aforesaid, at, &c., aforesaid, made his certain warrant in writing, under his hand and seal of



office of sheriff aforesaid, directed to the keeper of the gaol of the said county of ———, and to the said C. D., the said sheriff's bailiff, and thereby commanded him, the said C. D., that he should take the said plt., if he should be found in his bailiwick, and safely keep him, so that the said sheriff might have the body of the said plt. before our said lord the king, at Westminster aforesaid, on ——— next, after ———, to answer the said E. F. in the plea, and to the bill in the said writ mentioned; which said warrant, afterwards, and before the return of the said writ, and before the said time, when, &c. in the said first and second counts mentioned, to wit, on the day and year last aforesaid, at, &c. aforesaid, was delivered to the said C. D., to be executed in due form of law. By virtue of which said writ and warrant, the said C. D., as such bailiff as aforesaid, and the said E. F., as his servant, and by his command, afterwards and before the time appointed for the return of the said writ, to wit, at the said time, when, &c., in the said first and second counts mentioned, and within the bailiwick of the said sheriff, to wit, at, &c., aforesaid, took and arrested the said plt. by his body, in the said messuage or dwelling-house in the said first count mentioned, and kept and detained him in the custody of the said C. D., at the suit of the said E. F., for the cause aforesaid, for the said space of time in the said first count mentioned, as it was lawful for them to do, for the cause aforesaid. (*If a wounding or actual battery be justified, the occasion thereof must be stated: see a precedent, 3 Chit. Pl. 1086.*)

See other forms of pleas justifying imprisonment under and without process, 3 Chit. Pl. 1076 to 1092.

REPLICATION TO PLEA JUSTIFYING IMPRISONMENT UNDER A LATITAT, AND WARRANT PROTESTING THE ISSUING OF THE WRIT AND WARRANT, AND DE INJURIA AS TO THE RESIDUE.

(*Precludi non, as post, "Replication."*) Because, protesting that the said writ of our said lord the king, called a *latitat*, was not issued out of the said court of our said lord the king, before the king himself, directed to the said sheriff of S——, or delivered to the said sheriff, to be executed, and that such warrant was not thereupon made by the said sheriff, or delivered to the said deft., in manner and form as the said deft. hath above, in his said second plea in that behalf, alleged, for replication: nevertheless, in this behalf, the said plt. saith, that the said deft., at the said times, when, &c., in the said first count of the said declaration mentioned, of his own wrong, and without the residue of the cause in his said second plea alleged, committed the said several trespasses in the introductory part of the said (second) plea mentioned; and this the said plt. prays may be inquired of by the country, &c.

See other forms of replications of excess, 3 Chit. Pl. 1205.

[\*520]

*\*Evidence for Plaintiff.*

*Proof of Imprisonment.*] Every restraint on the person imposed by another, would appear to constitute an imprisonment, though no actual force is made; and, therefore, if a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment, and gives the party thus consenting to go, an action of false imprisonment: see *Pocock v. Moore*, 1 R. & M. 321. If an officer show his warrant to the party charged with the offence, and therefore voluntarily attend the officer to a magistrate, it is not such an arrest as will support trespass and false imprisonment: 2 N. R. 211; 1 Esp. Rep. 431. If a person, whose real name is William, is asked, before process against him, whether his name is not John, he cannot maintain trespass, for he shall not be allowed to avail himself "of the mistake which he himself occasioned," per *Ld. Ellenb.*, 3 Camp. 110; and, in 1 B. & A. 650, where his lordship said that *Lord Loughborough* had held the same, and

the old decisions, *Moo. 457*; *Hard. 523*, which supported a contrary doctrine, are overruled, on the principle of *volenti non fit injuria: ib.* An unlawful detention is evidence of a new caption: *Cro. Jac. 379*; and see *post*, "*Malicious Arrest*," as to what constitutes an arrest. Every imprisonment includes an assault: *1 R. & M. 321*.

*Damages.*] The circumstances under which the imprisonment took place should be proved as fully as possible: whether plt. was unnecessarily exposed in the streets, and, if arrested on suspicion of felony, whether he was taken before a magistrate, to be examined as soon as possible, *Com. D. Imprisonment, H. 4*; or whether he was detained after it was clear that he was innocent, for what period of time he was detained, and in what manner, whether he was confined in an unusual and unhealthy place, whether he was handcuffed, and that he did not attempt to escape: *4 B. & C. 596*. It is sufficient to prove that the officer had the authority, was near, and acting in the arrest, without proving that he was the person who actually made the arrest: *Cowp. 65*. The plt. should be prepared to prove his special damage, as laid: unless plt. has specially stated his damage, with a *per quod*, he will not be entitled to adduce evidence of it; therefore, plt. cannot give evidence of having caught the gaol fever from being in prison, and communicated it to her husband, in consequence of which he died, unless it is specially stated in the declaration as substantive matter of injury or complaint, *Peake, C. 87*; or that plt. had been stinted in his allowance of food during his confinement: *ib.*; *1 Esp. Rep. 62, 354*. As to what may be proved under the *alia enormia*, and damages generally, *post*, "*Trespass*."

*Admission of Co-Trespassers.*] Evidence of an admission made by one of several defts. in trespass, will not, it is true, establish the others to be co-trespassers; but, if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object: *per Ld. Ellenb., 11 East, 585*. If three defts. have jointly imprisoned the plt., the declaration of one of the defts., made some weeks afterwards, in the absence of the others, tending to show that the imprisonment arose from malice, is admissible evidence in an action for false imprisonment brought against all three: *Wright v. Count, 2 C. & P., c. 233*; see further, *ante, 52*.

\*Evidence for Defendant.

[\*521]

The deft. may call witnesses, under the plea of the general issue, to prove that he did not imprison or assault plt. Where there is any question as to the identity of the deft., he may prove that he was not present at the time, or that it was done by another person, &c. He may also show that no actual imprisonment took place, as where the party attended of his own accord: *ante, 520*. Under a special plea, the deft. must be prepared to prove all the facts put in issue. As to evidence in justification by sheriffs, constables, officers, justices of the peace, &c., see those titles. In an action against a private person, who justifies imprisoning plt. by delivering him to a constable on suspicion of felony, he must prove the circumstances as stated in his plea, showing the grounds for suspicion; and he should prove

a felony, as stated in his plea, had been committed: *ante*, 516; 2 Selw. N. P. 890. If he justify that he himself imprisoned plt., he must prove plt. committed the felony, *ib.*; and, in such case, proof of mere suspicion will not bar the action, though it may go in mitigation of damages: *Adams v. Moore*, 2 Selw. N. P. 890. A private person may prevent the perpetration of a felony; therefore, he may imprison a husband to prevent his murdering his wife: *Handcock v. Baker*, 2 B. & P. 260. So, if two persons are fighting, and there is reason to fear that one of them will be killed by the other, it is lawful to part and imprison them, till their anger is cooled: 2 Roll. Ab. 559; see, further, *post*, "*Trespass*."

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### FALSE RETURN.

*Farm of Remedy for.*] Where the sheriff makes a false return, an action on the case lies against him, at the suit of the person damnified by such false return, Com. D. *Return*, E. 2; but he is not liable to an action, till he has made his return, *Moreland v. Leigh*, 1 Stark. 388, and see *post*, 523, and, as to when the sheriff is liable for a false return, see Tidd, 309, 1044, 1062.

*Form of Pleadings.*] The venue is transitory: 1 Wils. 336. In the framing of the declaration in an action for a false return, the judgment and the writ must be stated and proved in evidence, and a variance, in any material point, between the allegation and proof, will be fatal. As to what is a variance, see *ante*, 479, 483. It is not necessary to refer to the record of the judgment, *Stoddart v. Palmer*, 3 B. & C. 2. If the *fi. fa.* were against two, and it be alleged that the goods of both were taken, it will suffice to prove that the goods of one were taken: *Jones v. Clayton*, 4 M. & S. 349.

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### Precedents.

#### DECLARATION AGAINST SHERIFF FOR A FALSE RETURN OF NULLA BONA, TO A WRIT OF FIERI FACIAS.

(*State the judgment, as post*, "*Judgment*," and afterwards proceed thus :) And the said plt. further saith, that, the said judgment being in full force, and the said damages (or, if in debt, say, "debt and damages") so recovered as aforesaid, remaining unpaid and unsatisfied, he, the said A. B., on, &c., in the — year of the reign of our said lord the king, for the obtaining satisfaction thereof, sued and prosecuted out of the said court of our said lord the king, before the king himself (or, if in C. P., "of the Bench aforesaid,") at Westminster aforesaid, a certain writ of our said lord the king, called a *fieri facias*, directed to the sheriff of —; by which said writ, our said lord the king commanded the said sheriff that of the goods and chattels of the said E. F., in his, the said sheriff's [\*522] bailiwick, he should cause to be made the damages (or, if in debt, say, "debt and damages") aforesaid, and that he should have that money before our said lord the king (or, if in C. P. say, "justices of the bench,") at Westminster aforesaid, on &c., to render to the said plt. for his damages (or, "debt and damages") aforesaid, and that the said sheriff should have there then that writ, which said writ, afterwards, and before the delivery thereof to the said sheriff, as hereinafter mentioned, was duly indorsed with a direction for him, the said sheriff, to levy £—, besides sheriff's poundage, officer's fees, and all other incidental expenses; and which said writ, so indorsed, afterwards and before the said return thereof, to wit, on, &c., at, &c., was delivered to the said deft., who then and from thence, until, and at and after the return of the said writ, was sheriff of the said county of S—, to be executed in due form of law. By virtue of which said writ, the said deft., so being sheriff of the said county of S—, as aforesaid, afterwards, and

before the said return of the said writ, to wit, on, &c., last aforesaid, at, &c., aforesaid, and within his bailiwick, as such sheriff, as aforesaid, seized and took in, execution divers goods and chattels of the said E. F., of great value, to wit, of the value of the moneys so indorsed on the said writ, and directed to be levied, as aforesaid, and then and there levied the same thereout. Yet the said deft., so being such sheriff of the said county of S—, as aforesaid, not regarding his duty as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve, the said plt. in that behalf, and to deprive him of the said moneys so indorsed on the said writ, and directed to be levied as aforesaid, and of the means of obtaining the same, had not the said moneys so levied, as aforesaid, or any part thereof, before our said lord the king (or, "before the justices of the bench,") at Westminster aforesaid, at the return of the said writ, according to the exigency thereof, and of the said indorsement so made thereon, as aforesaid, but therein wholly failed and made default; and, at the return of the said writ, to wit, on, &c., aforesaid, falsely and deceitfully returned to the said court of our said lord the king, upon the said writ, that the said E. F. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages (or, "debt and damages") aforesaid, or any part thereof, as by the said writ, and the return thereof, remaining of record in the said court of our said lord the king, before the king himself here, to wit, at Westminster aforesaid fully appears. By means of which said premises the said plt. hath been and is greatly injured and deprived of the means of obtaining the said moneys so indorsed on the said writ, and directed to be levied, as aforesaid, and which are still wholly unpaid, as aforesaid, and is likely to lose the same, to wit, at, &c., aforesaid.

#### SECOND COUNT FOR NOT LEVYING, AND FALSE RETURN OF NULLA BONA.

(The same as the first count to the statement of the delivery of the writ to deft., and then proceed as follows :) And, although there were then, and afterwards, and before the return of the said last-mentioned writ, divers goods and chattels of the said E. F., within the bailiwick of the said deft., as such sheriff, as aforesaid, whereof the said deft. could, and might, and ought to have levied the moneys so indorsed on the said last-mentioned writ, and directed to be levied, as last aforesaid, to wit, at, &c., aforesaid, whereof the said deft., so being sheriff, as aforesaid, there had notice. Yet the said deft., so being sheriff of the said county of —, as aforesaid, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve, the said plt. in this behalf, and to deprive him of the moneys so indorsed on the said last-mentioned writ, and directed to be levied, as last aforesaid, and of the means of obtaining the same, did not nor would, at any time before the return of the said last-mentioned writ, levy the moneys last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed, and made default, and, at the return of the said last-mentioned writ, to wit, on, &c. aforesaid, falsely and deceitfully returned to the said court of our said lord the king, that the said E. F. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages (or, "debt and damages") last aforesaid, or any part thereof, as, by the said last-mentioned writ, and the return thereof, remaining, &c. (Proceed as in the first count to the end.)

#### \* Evidence.

[\*523]

In this action against the sheriff, if he return *nulla bona*, plt. may falsify such return, by showing that there were goods of the deft.'s on the premises when he delivered the writ to the sheriff: *Bradley v. Windham*, 1 Wils. 44. And, if the sheriff return that he has seized the goods, which remain in his hands for want of buyers, where a price has been offered for the goods, although not equal to their full value, plt. will recover, on proving such fact: *Barnard v. Leigh*, 1 Stark. 43; but see *Keightly v. Birch*, 3 Camp. 521. But if, after such a return, the deft. become bankrupt, on an act of bankruptcy committed before the seizure, it is competent for the sheriff to show this as an answer to an action for not selling the goods on a *venditioni exponas*: *Beynon v. Garratt*, 1 C. & P. 154. In an action for a false return of *nulla bona* to a writ of *fi. fa.*, the sheriff

cannot give in evidence, even in mitigation of damages, that he held an inquisition to inquire whether the property in the goods was in the debt, or not: *Glossop v. Pole*, 3 M. & S. 175. Where a sheriff defends his return of *nulla bona*, on the ground that the person against whom the writ issued was the domestic servant of an ambassador of a foreign state, plt. may show that the appointment was fraudulent, and merely to afford a ground of such pretended defence: *Deloalle v. Plomer*, 3 Camp. 47. The sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud: *Tyler v. Duke of Leeds*, 2 Stark. 218. As to whether he may do so where he disputes a judgment of another creditor under an execution under which the sheriff had the goods when plt.'s writ was delivered, see *Warmoll v. Young*, 5 B. & C. 660; Pea. 65. If the sheriff can show that the plt. assented to his withdrawing, on a claim made for rent and taxes, he will have a good defence, though no rent or taxes were due: *Stuart v. Whittaker*, 1 R. & M. 310. Where sheriff returns that he has levied part only of the sum directed to be levied on the *fi. fa.*, he may prove that plt. has waived his right of action, by receiving the money which the sheriff has returned to have been received by him: *Brydon v. Garratt*, 1 C. & P. 154. Where the sheriff returns to a writ of *fi. fa.*, that he has levied a certain sum, out of which he has paid a part to the landlord of the premises for arrears of rent, he must show that such was in arrear: *Keightley v. Birch*, 3 Cowp. 521. Slight evidence, however, of this fact is sufficient on the part of the sheriff; but the landlord himself is not, in such cases, a competent witness: *ib.*

Where the sheriff returns *nulla bona*, after having taken goods as the goods of the debt. in execution, a person who claims property in the goods, and who has taken them out of the sheriff's hands, is a competent witness in an action against the sheriff for a false return, to prove the value of his property in the goods; as the sheriff cannot, after a return of *nulla bona*, maintain an action against him, being precluded by his return, disclaiming all interest in the goods: *Thomas v. Pearce*, 5 Price, 547; *Ward v. Wilkinson*, 4 B. & A. 410; *Bland v. Ansley*, 2 N. R. 331. The assistant to a sheriff's officer, who is left in possession under an execution, is a competent witness for the sheriff: *Clark v. Lucas*, 1 C. & P. 156.

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FEE SIMPLE.—See EJECTMENT, 457.

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FEME COVERT.—See HUSBAND AND WIFE;—ABATEMENT; 5 to 9.

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[\*524]

\*FINE AND RECOVERY.

*Proof of.*] The chirograph of a fine is sufficient evidence of it, *Black v. Braybrook*, 2 Stark. 19; the chirographer being the person appointed by law for that purpose, he must be trusted, as far as he acts under its authority, B. N. P. 229; but, where the fine is to be proved with proclamations, the chirograph alone will not be sufficient,—the proclamations must be examined with the roll; the chirographer not being appointed to

copy the proclamations, therefore his indorsement on the back of the fine is not binding; *ib.*; *Doe d. Hatch v. Bluck*, 6 Taunt. 486; *Waldron v. Coombe*, 3 *ib.* 166. The enrolment of a fine is established by the certificate of its enrolment: 1 Ph. Ev. 362.

[The acknowledgment of a married woman to a fine, taken at Hamburg, was allowed to be filed, although the affidavit verifying the due taking thereof, in the German language, was sworn before the proper officer, but not signed by the deponent, it not being the practice of the foreign law to do so: *In re Birch*, 6 Scott, 185.]

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FLEET BOOKS.—See PUBLIC DOCUMENTS.

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FORBEARANCE.—See GUARANTEE.

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FOREIGN ATTACHMENT.

The courts do not, *ex officio*, take notice of this custom of London, of proceeding by foreign attachment; consequently, the same must be pleaded, and set forth specially: 1 Rol. R. 106; Co. Ent. 139, *b.*; 1 Saund. 142, *a.*; 1 Saund. 60, *n. sed quære*, see 1 Doug. 378. In assumpsit, this defence may be given in evidence, under the general issue, 1 Salk. 291, 280, 1 Saund. 67, *a. n.*, *Morris v. Ludlam*, 2 H. Bl. 362, Com. D. *Attachment*, *A.*; but, in debt on a specialty, it must be pleaded specially, 1 Saund. 67, *a. n.* 1, Co. Ent., 139, *b.*; and so in covenant: Com. D. *Pleader*, 2 *b.*, 8.

[In assumpsit for money had and received, the defendant pleaded a recovery in foreign attachment, by a creditor of the plaintiff, and that such creditor had execution thereof; replication, no execution executed pursuant to the custom; and upon this issue; held by the Court of Common Pleas, first, that an allegation, that the plaintiff had had no notice of the proceedings in the foreign attachment (to which he was defendant) was no answer to this plea, the custom being found not to require that any notice should be given to the defendant in the attachment; 2dly, that the custom alleged in the plea, that after execution had and executed, the garnishee should be discharged, and it being expressly found that no writs of execution were issued against the defendant or the garnishee, the plaintiff was entitled to judgment on that issue; that the defendant, by taking issue on that replication, was not precluded from proving, nor the jury from finding according to the fact; and that the attorney for the garnishee was not incompetent to prove custom: *Magrath v. Hardy*, 4 Bing. N. S. 782; 6 Scott, 627; 6 Dowl. P. C. 749.

Where the plaintiffs, as assignees, had instituted a suit in the Mayor's Court for the very same debt, and judgment been given against them, it was determined, that they could not file a bill in equity for the same matter, there being no allegation of want of jurisdiction, of irregularity, or of incompetency in the court below to do justice; and a plea of verdict and judgment there, was consequently allowed: *Behrens v. Paul*, 1 Keene, 456.]

## FOREIGN JUDGMENT.

**PLEADING AS TO.]** Assumpsit lies on a foreign judgment, it not being a record in this country, 1 Doug. 4, *Hall v. Odber*, 11 East, 124; and it lies on an Irish judgment; *Gray v. Cox*, 4 B. & C. 111; 6 D. & R. 200. So also debt lies: *Henry v. Adey*, 3 East, 221; 1 Doug. 1. See *post*, "*Judgment*." When intended to be set up as a defence, it need not be pleaded specially in assumpsit or case; but it must be so in trespass or covenant: see *post*, "*Judgment*."

**EFFECT OF.]** If the judgment of a foreign court of competent jurisdiction was final and conclusive in the foreign country in which it was given, it will be conclusive here, *Plumer v. Woodburn*, 4 B. & C. 367, 7 D. & R. 25. *Roach v. Garrahan*, 1 Ves. 159; *Burrows v. Jemino*, 2 Str. 733; *Tarleton v. Tarleton*, 4 M. & S. 20; and unless the contrary be shown, the court will presume that the decision of the foreign court was consonant to the justice of the case: *Arnott v. Redfern*, 3 Bing. 353.

[\*525] But, if it appear on the face of the foreign proceedings that the judgment is founded in injustice, as where it appears the debt has never been summoned, in which case the court will have no jurisdiction, the judgment will not be conclusive, and the courts here will not give effect to it: *Buchanan v. Rucher*, 9 East, 192; *Wedderburn v. Bell*, 1 Camp. 63; 3 B. & C. 235; 5 D. & R. 106. [But see *Becquet v. McCarthey*, 2 B. & Adol. 951.] The effect of the judgment of a foreign Court of Admiralty has already been considered, *ante*, 35. The certificate of a vice-consul has been compared to a foreign judgment, but it will not be admitted as evidence of the facts stated in it: *Waldron v. Coombe*, 3 Taunt. 162. An Irish judgment is not a record here: *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 47. [See *Guinness v. Carroll*, 1 B. & Adol. 459.] And though, as already observed, the foreign judgment may in general be conclusive, yet it is not so in an action of debt or assumpsit brought thereon in this country, when it will be considered as *prima facie* evidence of a debt: *Walker v. Witter*, 1 Doug. 1, and see *ib.*, 5, n.; *Phillips v. Hunter*, 2 H. Bl. 410; Willis, 37, a.

[An action will not lie in the courts of Westminster upon the judgment of a foreign court, unless it clearly appear by the transcript of the proceedings that the defendant was subject to the jurisdiction of the foreign court, and that the judgment pronounced against him was final and for a definite sum: *Obicini v. Bligh*, 1 M. & Scott, 477; 8 Bing. 335; *overruling Malony v. Gibbons*, 2 Camp. 504. See further as to the nature and effect of foreign judgments, *Appleton v. Braybrook*, 6 M. & Sel. 34; *Henley v. Soper*, 2 M. & R. 153; 6 B. & C. 16; *Martin v. Nicolls*, 3 Sim. 458; *Becquet v. McCarthey*, 2 B. & Adol. 951. A plea of judgment recovered for the same cause of action in the vice-admiralty court of Sierra Leone, not a court of record, and the judgment being only evidence of the cause of action, and not shown to be binding and conclusive on the defendant, held not a bar to a count on the original ground of action, in the Common Pleas of England. *Smith v. Nicholls*, 5 Bing. N. S. 208; and 7 Dowl. P. C. 283.]

*Mode of Proof of.]* This will be found, *ante*, 36.



## FOREIGN LAW.

PLEADINGS AS TO.] The courts will not, *ex officio*, take notice of foreign laws, or the laws of our plantations, and consequently they must, in general, be stated in pleading: *Collett v. Ld. Keith*, 2 East, 273; Cowp. 174; 6 Moo. 194; Salk. 651; *Hunter v. Potts*, 4 T. R. 192; *Male v. Roberts*, 3 Esp. Rep. 164. It seems, the court will not, *ex officio*, take notice of the laws of Scotland, *Mure v. Kaye*, 4 Taunt. 40, 2 D. & R. 280; or of Ireland, *ib.*; *Gray v. Cox*, 4 B. & C. 111; 6 D. & R. 200.

EFFECT OF.] If a contract be made in a foreign country, it seems to be a general rule, that if it be not binding there, it is not binding in this country, *Alves v. Hodgson*, 7 T. R. 241, 1 B. & P. 141, 8 T. R. 609, *Potter v. Brown*, 5 East, 124; but the converse does not hold, *ib.*; 2 East, 255, 2 D. & R. 280; and the usage of Scotland, or foreign states, cannot prevail against the settled law of this country, in the case of an action brought here: *ib.* A contract made in England, to be executed in Scotland, should be regulated by the rules of the English law: 2 B. & P. 88; and see 5 B. & C. 443; 8 D. & R. 187. As to how far marriages abroad are valid, *ante*, 397. In general, the courts of this country will not recognise the revenue laws of foreign states, *James v. Catherwood*, 3 D. & R. 190, 1 D. & R. N. P. 38, 41; nor their penal laws, 6 M. & S. 99; and see *Ld. Ellenborough's* judgment there. Where an action was brought for money lent in France, and unstamped receipts were produced in proof of the loan, evidence to show that by the laws of France, such receipts required stamps to render them valid, was rejected; and *Abbott, C. J.*, then said, "In the time of Lord *Hardwicke*, it became a maxim, that the courts of this country will not take notice of the revenue laws of a foreign state; there is no reciprocity between nations in this respect. Foreign courts do not take notice of our stamp laws, and why should we be so courteous to them, when they do not give effect to ours? It would be productive of prodigious inconvenience, if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was valid or not:" *James v. Catherwood*, 3 D. & R. 190. But, if a bill or instrument be made in any part of the king's dominions, as in Jamaica, where, by the law of such place, a stamp is required, such instrument cannot be recovered upon in a court here, unless properly \*stamped, according to the law of the place where the [\*526] same was made; *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Levy*, 3 Camp. 166. [The holder of a bill drawn in France and endorsed there in blank, cannot recover against the acceptor in the English courts, because by the law of France, an indorsement in blank does not transfer any property in a bill: *Trimbley v. Vignier*, 1 Bing. N. R. 151; 6 C. & P. 25.] [In a suit in a foreign court for the distribution of personal estate of a party domiciled out of the country, held, that such court is bound to adopt, in the interpretation of testamentary instruments, the rules of construction which would prevail in the country where the party was domiciled; but, that they are not bound to adopt the foreign rules of evidence, every court being governed by its own rules of procedure. *Yates v. Thompson*, 3 Clark. & Fin. 545.]

**PROOF OF.]** The existence of a foreign law, from which any instrument derives its legal operation, must be first proved, before such instrument will be allowed to be given in evidence in an English court, *Ganer v. Lanesborough*. Pea. Rep. 17, 1 D. & R. 41, *a.*; and it lies in the party setting up the foreign law in discharge, to prove the same. Where, to prove a divorce, an instrument was produced, under the seal of the synagogue at Leghorn, *Ld. Kenyon* held, that the law of the country must be known before he could take notice of a proceeding in a foreign court: *ib.* And, where a party justifies an arrest in Scotland, he must make that justification complete, by pleading the law of Scotland to show the validity of the arrest: *Mure v. Kaye*, 4 Taunt. 44; *Freemoult v. Dedire*, 1 P. Wms. 431. So, where the acceptor of a bill had been discharged by the laws of the country where the bill was drawn, after proof of the custom there regarding bills of exchange, he was allowed to give such discharge in evidence, in answer to an action brought against him here: *Burrows v. Jemino*, 2 Str. 733; *Feanbert v. Turst*, 1 Brown, P. C. 38.

The existence of the written law of a foreign country must be proved by the production of an authenticated copy: *Clegg v. Levy*, 3 Camp. 166; *Millar v. Heinrich*, 4 *ib.* 155; *Inglis v. Usherwood*, 1 East, 521; *Buchanan v. Rucker*, 1 Camp. 63. To prove the acts of state of a foreign government, copies should be produced examined by the public archives abroad: *Richardson v. Anderson*, 1 Camp. 65, *n.* A copy of the civil code of France was admitted in evidence, when produced by the French consul, and declared by him to be an authenticated copy of the law of France: *Lacon v. Higgins*, D. & R. N. P. C. 1 Ph. Ev. 383. The unwritten law of a foreign country may be proved by the parol examination of witnesses of competent professional skill; *Millar v. Heindrick*, 4 Camp. 155; but see *Borthlinck v. Schneider*, 3 Esp. Rep. 58.

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FOREIGN PLEA.—See "ABATEMENT."

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FORMER RECOVERY.—See JUDGMENT RECOVERED.

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FRAUD.

**PLEADINGS AS TO.]** In an action for fraud or misrepresentation, where there has been a contract, it is now more usual to declare in *assumpsit*, so as to join the count for money had and received, as in the case of a false warranty, or other misrepresentation in the sale of goods; an action on the case, however, also lies, Doug. 91; and if there has been any actual fraud or misrepresentation, independent of a contract, 4 Camp. 22, it is the preferable form of action, especially as the *scienter*, though expressly alleged in the declaration, need not be proved: *Williamson v. Allison*, 2 East, 446; *Jarvis v. Adamson*, 4 Bing. 69. And, for fraudulently representing a person fit to be trusted, or for other deceit, where there has been no contract between the parties, or the deceit be independent of the

contract, *Meyer v. Ewerth*, 4 Camp. 22, *Gardiner v. Gray*, *ib.* 144, *Laing v. Fidgeon*, *ib.* 169, *Powell v. Edmunds*, 12 East, 11, case is the proper form of remedy: 1 Chit. Pl. 129. And, in some cases, where there has been a fraud, and the Statute of Limitations is expected to be set up as a defence, it is best to sue for the fraud, in preference to \*suing on the contract: *Brown v. Howard*, 4 Moo. 508; 2 B. & B. 73, s. c.; [\*527] *Short v. McCarthy*, 3 B. & A. f. 626; *Howell v. Young*, 5 B. & C. 259; 8 D. & R. 14. An action on the case for deceit lies, though it be stipulated that the vendee may return the article if he dislike it: *Wallace v. Jarman*, 1 Stark. 162.

Assumpsit lies for money obtained by fraud, *Lamine v. Dorrell*, 2 Ld. Raym. 1216, *Hitching v. Campbell*, 2 Bl. R. 827, 3 Wils. 204, *Boyer v. Dodsworth*, 6 T. T. 683, 1 Chit. Pl. 87, or for the value of goods obtained, *Boughton v. Sandiland*, 6 Taunt. 374, 6 T. R. 681, *Rex v. Filwood*, 2 T. R. 145, 3 Wils. 304, 5 Moo. 525, the plt. being at liberty to waive the tort: but, in these cases, it may sometimes be advisable to sue in case, to avoid a set-off, or to obtain the real value of the goods, or to avoid doubtful right in plt. to the goods: see *Smith v. Hodson*, 4 T. R. 211; *Edmeads v. Newman*, 1 B. & C. 418; 2 D. & R. 568, s. c. Assumpsit lies for goods as sold against a deft., who, by fraud, procured the plt. to sell to an insolvent goods which the deft. got in his possession: *Smith v. Spooner*, 3 Taunt. 274; and see *Biddle v. Levy*, 1 Stark. 20; but see *Read v. Hutchinson*, 3 Camp. 352.

As it is an intendment of law that a person is innocent of a fraud, or any other imputation affecting his reputation, the party insisting upon the contrary must state it fully in pleading: Co. Lit. 78, b.; Heath's Maxims, 207 to 212; 1 Chit. Pl. 204. In an action for falsely representing a third person fit to be trusted, a *scienter* must be alleged and proved; though, indeed, the word "*fraudulently*" might be a sufficient allegation in this respect, especially after verdict: Willes, 584. But in an action on the case for fraud, or for misrepresentation of any kind, an express warranty, or *scienter*, need not be alleged, nor proved if alleged: 2 East. 446: *Adamson v. Jarvis*, 4 Bing. 69.

Where fraud is intended to be set up as a defence, it may be given in evidence under the general issue in assumpsit: Doug. 433; 2 T. R. 551. Even in debt on a specialty, a defence that the deed was obtained by fraud may be given in evidence under *non est factum*, 2 Camp. 272, though it is most usual to plead it. In such a plea, or in a replication of fraud, it is necessary to state the particulars of the fraud: 9 Co. 110. The usual replication to a plea of fraud in debt on a specialty is, that the sum was duly obtained: Com. D. Pleader, 2 T. R. W. 19, 20.

[ITS EFFECT IN GENERAL.] All contracts, specialties, and transactions, tainted with fraud, are void, though the fraud does not appear on the face of them: *Petrie v. Hannay*, 3 T. R. 418; 2 Stark. Ev. 586; Chit. Cont. 81, 222. But, in the case of records obtained by fraud or collusion, third persons only can set up the defence, and not the parties to the record, whose only relief is in equity, except in the case of a judgment obtained on a *cognovit*, or warrant of attorney, 2 Marsh. 392, 7; 7 Taunt. 97, s. c.; 1 Anst. 8; 3 V. & B. 42; Doug. 196; Cowp. 727; 1 H. Bl. 75. Where A. agreed to underlet his house to B., the latter paying for the furniture at an appraisalment, it was decided that B. was excused from the per-

formance of the agreement, because A., at the time he granted the house, was in arrear for rent to his landlord: 3 B. & P. 172. Where a sale is fraudulently procured by the vendee, he may be sued by the vendor, before the expiration of the credit agreed on to be given: 1 Esp. Rep. 430; 2 *ib.* 523. As to frauds in cases of sale, &c., *post*, "*Goods Sold*." The obtaining goods under false pretences, under colour of purchasing them, or otherwise, does not change the property: 7 Taunt. 59; 6 Mod. 114. Money obtained by fraud or misrepresentation is recoverable back, although the deft. would, in equity, be entitled to the money: 1 Camp. 124; 1 Salk. 28; 5 Moo. 98; 3 Taunt. 274. No part of a fraudulent transaction can be supported, except where a consideration has been given, in consequence of which, the parties cannot be \*placed in [\*528] the same situation: and in ordinary cases of fraud, in equity, the whole transaction is undone, and the parties replaced in their former situation: *Danberry v. Cockburn*, 1 Meriv. 643. The defence of fraud cannot in general, be set up by a party privy to it; for no person can allege his own fraud to invalidate his own deed: Cro. J. 270; *Roberts v. Roberts*, 2 B. & A. 367; 1 W. Bla. 363. And it is not permitted to a vendor, or other person, to defeat even collaterally, his own sale or act on the ground that it operated as a fraud on his creditor, or the like, 1 Stark. 60, 2 B. & A. 134, Cro. J. 670, 3 V. & B. 42; *sed quære*, if the court will not allow, in some cases, a defence of fraud, on third persons, to be set up by a party privy to it.

**PROOF OF.]** The fraud may be proved by parol evidence, or any circumstances, however contrary to apparent facts or statements in the written instrument: B. N. P. 172; 2 B. & A. 370. This rule does not contravene the general one against the admissibility of parol testimony against written, as the effect and result of such evidence is, that the instrument never had any operation; and, on grounds of policy and necessity, this rule may be supported: 3 B. & C. 623. The mode of proving fraud must depend on the facts of each particular case. As to what amounts to fraud, see Chit. Cont. 222 to 227, 113, 137; 3 Chit. Com. Law. 155, &c.

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## FRAUDULENT CONVEYANCE.

WHERE a person claims by virtue of an assignment, the opposite party may impeach the transaction, either by evidence to show the transfer was merely colourable; or, if an assignment has been regularly executed, so as to transfer the goods as between the debtor and the assignee, it may be shown that, as against a creditor, the conveyance is void under 13 El. c. 5, (confirmed by 14 El. c. 11, s. 1, and made perpetual by 29 El. c. 5, s. 2,) which enacts, that fraudulent deeds, &c., made to avoid the debts of others, shall be void. This is a very common defence in an action against a sheriff for seizing goods in execution. It may be given under the general issue, either in trespass or trover, as it shows that the goods are not the goods of the plt. But, if the goods were, in fact, the goods of the plt., but the deft. justifies the taking of them under a *fi. fa.* against him, such defence cannot be given in evidence under the general issue in trespass, but the same must be pleaded specially.

The statute extends to the fraudulent assignment of personal property; but it is doubtful how far surrenders of copyhold are within it: 1 Cox. R. 278. The party injured, alone, can avail himself of this statute: *Hawes v. Leader*, Cro. J. 270; *Wormall v. Young*, 5 B. & C. 660; 8 D. & R. 442. [The assignees of an insolvent are "parties grieved" within the meaning of the 13 Eliz. c. 5, and may recover from the parties to the fraudulent conveyance: *Butcher v. Harrison*, 4 B. & Adol. 129.]

It is usually, under this statute, a question of fact for the jury, whether the assignment has been executed with intent to defraud either the whole body of the creditors, or some particular creditor: *Leonard v. Baker*, 1 M. & S. 251. And, in such cases, it may be a question of law, or of fact, or a mixed question of law and fact, whether the assignment amounted to a fraud: *per Buller, J., Estwick v. Caillard*, 5 T. R. 420. When the fraud may be collected from the instrument or deed coupled with the extrinsic circumstances and intention of the parties, it is a question of law arising from the facts so found; but, when it depends upon the intent, its existence is a fact to be ascertained by a jury: *ib.* [See further, *Shears v. Rogers*, 3 B. & Adol. 363.]

*What amounts to a Fraudulent Conveyance, &c.*] Voluntary assignments of property, without valuable consideration, would *prima facie*, \*amount to fraud under this statute, 1 Fonbl. 271; though, [\*529] nevertheless, the party conveying must be in insolvent circumstances at the time of the conveyance, to render it fraudulent: 5 Ves. 384; 2 Atk. 520. A debtor may, under this act, without fraud, assign a part or the whole of his property to a particular set of creditors or creditor, if possession is at the same time given, although to the hinderance of his other creditors. No conveyance can be fraudulent unless it can be proved that the party conveying the goods was indebted in an equal sum at the time of the conveyance, or nearly so, B. N. P. 257; though this has been doubted, *ib.*, as there would be a difficulty in showing that the object of the conveyance was to delay the creditor. Still, it seems, that if a conveyance could be proved to have been made with a view to defraud a future creditor, it would be void under the stat.: 5 T. R. 420. An assignment by a debt., pending the plt.'s suit, of all his effects, for the benefit of his creditors, under which possession is immediately taken, is not fraudulent, 4 East, 1, although made to delay the plt.'s execution: neither is it fraudulent to confess a judgment to one creditor, in order to defeat the pending execution of another creditor, 5 T. R. 424; for a debtor, as well as an executor, may give preference to a particular creditor: *ib.*

The absolute transfer of personal chattels, without a delivery of possession, is evidence of fraud: *Edwards v. Harben*, 2 T. R. 587. In general, the continuing possession of the vendor, or assignor, affords a strong presumption of fraud: *Twyne's case*, 3 Rep. 80, *b.* Thus, where the vendor remains in possession, jointly with the servant of the vendee, it affords a strong legal presumption that the assignment is fraudulent and void against creditors: *Wordall v. Smith*, 1 Camp. 333. And, in *Twyne's case*, 3 Rep. 80, where A., being indebted to B., and also to C., who brought his action, made a secret conveyance of his goods to B. but continued in possession, the conveyance was held to be fraudulent within the statute: 1, because the gift was general; 2, because the donor continued in possession of the goods, and used them as his own; and 3, because it was

made pending the writ: *B. N. P.* 258; 2 Stark. Ev. 619. But a bill of sale, unaccompanied by possession, is valid against a creditor who is privy, and assenting thereto, *Steel v. Brown*, 1 Taunt. 381; and, though no possession be given, a presumption that the sale is *bona fide* may arise from the fluctuating state of the market: *Benton v. Thornhill*, 2 Marsh. 427; 7 Taunt. 149. The fact of the vendor's continuing in possession may not always be indicative of fraud, as where the want of immediate possession is consistent with the deed, as in cases where the assignment is from husband to wife: *Codogan v. Kennet*, Cowp. 432; *ib.* 435; 3 T. R. 620, *notis*; *ib.* 618; 10 Ves. 150. But, if the continuing in possession be accompanied by other circumstances, as if the consideration be grossly inadequate, *Dewey v. Baynton*, 6 East, 257, or the wife permits third persons to treat the property as her husband's, it may be evidence of fraud: *Bucknal v. Roiston*, Prec. Ch. 285; *Cole v. Davies*, 1 Ld. Raym. 724; *Dean v. Brown*, 8 D. & R. 95. And, in general, if the possession taken be merely colourable, there will be evidence of fraud, as where a creditor took possession on the 4th of April of the goods of a publican, under a bill of sale, and the person in possession permitted him to serve out liquors, and receive money as usual, till next day, when the goods were seized under an execution: *Paget v. Purchard*, 1 Esp. Rep. 205.

Where the plt. has never been in possession of the goods, but claims by an assignment, under which possession has been given, it will be sufficient for the deft. to show that the assignment is fraudulent and void, and unnecessary for him, in such case, to go further, and give evidence of the judgment and writ under which the goods are taken; but where the plt. was in possession of the goods at the time of the taking, the deft. must prove the judgment and writ, as he would otherwise appear to be a wrong-doer, and the plt., being in possession, would have a

[\*530] \*sufficient title as against him: *Lake v. Billers*, 1 Ld. Raym.

733; but see *Martyn v. Padger*, 5 Burr. 2631. Declarations and admissions made by the assignor at the time of executing the bill of sale, &c., are admissible, as part of the *res gestæ*, but if not made at another time: *Phillips v. Eamer*, 2 Esp. Rep. 357; 5 Esp. Rep. 243. The time of the transfer, with relation to the plt.'s action, verdict and judgment, (as if it be made immediately after a verdict for the plt.) the connexion between the parties (as where it is made to a son or daughter,) the secrecy with which it was made, the want of consideration, as evidenced by the probable inability of the supposed purchaser, are obviously material and important circumstances to be submitted to a jury: 2 Stark. Ev. 617.

[A mortgage of chattels, without delivery of possession to the mortgagee, is valid, if the mortgagor's continuing in possession be consistent with the terms of the deed: *Reed v. Wilmott*, 5 M. & P. 553, 7 Bing. 577; and see *Martindale v. Booth*, 3 B. & Adol. 498.]

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## FREIGHT.

*Form of Remedy for, and Pleadings.*] Where freight is payable under a bill of lading, the master or owner's remedy for it is in assumpsit or debt. Where there has been a charter-party under seal, and a covenant to pay freight to the master of the ship, he must sue in debt or covenant:

*Schack v. Anthony*, 1 M. & S. 573; *Bell v. Kymer*, 3 Camp. 549. And, in such case, the owners, not being parties to the deed, cannot sue. And assumpsit will not lie against them on the implied undertaking of the owners that the goods should be safely and securely conveyed, *Leslie v. Wilson*, 6 Moo. 425, n.; but, if the owners were not charged directly on the charter-party, but upon their general liability, it would be otherwise: *ib.*; *White v. Parker*, 12 East, 578; *Thompson v. Brown*, 1 Moo. 358; 7 Taunt. 656, s. c. Where the deed is only executed by the plt., and not by the deft. assumpsit is the proper form of remedy: *Sutherland v. Lishnan*, 3 Esp. Rep. 42. When freight is recoverable *pro rata itineris*, assumpsit should be brought, and not covenant on the charter-party: *Ritchie v. Atkinson*, 10 East, 295; *Atty v. Lindo*, 1 N. R. 240; Abbott, 314. The captain of a vessel may, in some cases, without any express contract with him, maintain an action against the consignee of goods under a bill of lading, upon an implied promise to pay the freight, in consideration of his letting the goods out of his hands; *Feise v. Bell*, 4 Taunt. 4; *Shields v. Davis*, 6 *ib.* 65.

Where the freight is sought to be recovered under a bill of lading, or charter-party not under seal, or any other parol contract, it is never necessary to declare specially, and the common count will suffice in all cases, even in actions against an indorsee of the bill of lading: *Dougal v. Kemble*, 3 Bing. 383, *Burrough, J. diss.*; *Leer v. Yates*, 3 Taunt. 387. Extra freight is recoverable under the count for work and labour, especially if there be a promise to pay it: *Hedley v. La Page*, Holt, C. 392. If the freight be payable by a deed, or charter party under seal, the declaration must, in general, be special thereon, *supra*; and the deed must, in general, be stated: *Atty v. Parrish*, 1 N. R. 104. The omission, however, to set out the deed, is cured by general demurrer: *Tilson v. Warwick Gas Comp.*, 4 B. & C. 962. The plea will be the same as in other cases.

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### Precedents.

#### INDEBITATUS ASSUMPSIT, FOR FREIGHT, PRIMAAGE, AVERAGE, &c.

(*The indebitatus count is as ante*, 139, *proceeding as follows* :) For certain freight, primage, and average, (*omit the words primage, and average, if the action be for freight only*) before that time and then due and payable from the said deft. to the said plt., upon, for, and in respect of, the carriage and conveyance of certain goods and chattels, by the said plt., \*before that time carried and conveyed in and on board [\*531] of divers ships or vessels, for the said deft., and at his special instance, &c., and for the care and attendance of the said plt. in and about the loading and unloading of the said goods and chattels, and the delivery thereof, as aforesaid. (*Conclusion as ante*, 139. *The quantum meruit thereon is as ante*, 140, *inserting as follows* :) Had, before that time, carried and conveyed certain other goods and chattels, in and on board divers other ships or vessels, for the said deft., and had bestowed other his care and attendance in and about the loading and unloading of the said last-mentioned goods and chattels, and the delivery thereof, as aforesaid, he, the said deft. undertook, &c. (*Conclusion as ante*, 140.)

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### Evidence for Plaintiff.

*The Contract for Freight.*] Where the action is for freight on a charter-party between the plt. and deft., the same should be produced, duly

stamped, and the deft.'s signature thereto proved: see *post*, "*Handwriting*." If the freight be due under a bill of lading, the same should be produced, duly stamped. In an action against the indorsee of the bill of lading, or consignee of the goods, whose liability for freight arises only in respect of the receipt of the goods, such receipt by him should be proved: see cases in 3 Chit. C. L. 422; *Dougal v. Kemble*, 3 Bing. 383. When agent liable for: 3 D. & R. 503; *Ward v. Felton*, 9 East. 507. It may be as well to observe, that, where freight is stipulated to be paid by a charter-party, or bill of lading, or other contract, such stipulation cannot be varied in its terms by any new or additional facts or evidence: see *Gibbon v. Young*, 8 Taunt. 254.

In an action for freight, when the plts. sue as ship-owners, and there is no express contract between the plts. and defts., they must prove their title by showing their legal ownership, pursuant to the Registry Acts, 26 G. 3, c. 60 s. 66, 34 G. 3, c. 68, s. 11, and that they were owners during the time the freight was earning, or any of those causes of action, accruing: *Chinnery v. Blackburn*, 1 H. Bl. 117, in *notis*. Evidence of the register of the ship must be produced, in which plts. names appear, from the Registry-office at the Custom-House, from whence the original register will be obtained. The registration, though necessary to complete the title of ownership, is not of itself evidence of title; it must therefore be proved that plts. recognized the register, and acted as owner, and were treated as such. The affidavit of the party, on which the register was obtained, should also be produced and proved: 2 Phil. Ev. 53. General evidence of ownership is sufficient, unless that fact be disputed.

*Delivery of Cargo.*] To entitle the plt. to the whole amount of the freight, he must prove a delivery, or tender of delivery, on payment of the freight, of the whole cargo to the deft.; see *Willes v. Bridger*, 2 B. & A. 287; 3 Chit. C. L. 410. As to when the entire profit is earned, see *ib*. If the deft. has neglected to perform his part of the contract, or has so acted as to have prevented the complete conveyance and delivery of the cargo, the same should be proved, and plt. will recover the whole freight in the shape of damages: *Doe d. Cholmondeley v. Weatherley*, 11 East, 332; *Birley v. Gladstone*, 3 M. & S. 205. If the deft. has dispensed with the performance of the voyage, and accepted the cargo at any other place, or in any other manner rescinded the contract of affreightment, this should be proved; and, in such case, the whole freight will be recoverable: *Christy v. Row*, 1 Taunt. 301; *Cook v. Jennings*, 7 T. R. 381. The goods being damaged will afford no defence: *Shields v. Davis*, 6 Taunt. 65; *Davidson v. Gwynne*, 13 East, 381, *post*. If the plt. was prevented delivering the goods in due time, &c., by the perils of the seas, &c., [\*532] and without his fault, this should be proved; as a capture and "re-capture, embargo, &c.;" 3 Chit. Com. L. 412. To recover *pro rata* freight, the delivery of the part of the cargo, or of the whole cargo, at a place short of the destination, should be proved, as well as the benefit, however slight, that deft. derived from such delivery; but this will be established by proof of the deft.'s acceptance of the cargo. Considerable difficulties have arisen in determining what shall amount to this acceptance. No actual acceptance by corporal touch need be proved; the acceptance may be proved by the express or implied directions: see 10 East, 378, 526; 2 Atk. 621; 1 Taunt. 300; 2 Holt, *Shipping*, 141; 12 East,



179. The deft. cannot dispute the payment of *pro rata* freight, if by agreement he has stipulated to pay it: 4 Rob. R. 77; 8 Taunt. 354.

*Amount recoverable.*] In the absence of any express contract as to the amount, the sum to be recovered will be on a *quantum meruit*, and evidence of the usage and custom of trade as to the amount should be proved. The 59 G. 3, c. 25, regulates the rate of freight, &c. for gold, &c. on board his majesty's ships. The freight for goods shipped from abroad, and consigned to a merchant in this country, is to be calculated according to the net weight of such goods, as ascertained at the king's landing-scales, and not according to the weights expressed in the bill of lading, unless there be a special contract so to pay for them: Holt, C. N. P. 346; see 4 Taunt. 102. If an entire ship be hired, and the burthen thereof expressed in the charter party, and the merchant covenant to pay a certain sum for every ton of goods which he shall lade on board, but do not covenant to furnish a complete lading, the owners can only recover payment for the quantity of goods actually shipped, Abbott, 188, 287; but, if a freighter agree to load a full and complete cargo, though the burden of the ship is described to be of a less quantity than it really is, yet the freighter must load a full cargo according to the real burden of the ship; and he will be liable for freight according to what he ought to have loaded, unless, indeed, the owner or master make a false description of the burden, with a fraudulent intent: 2 B. & A. 421; 3 Taunt. 469. If a certain sum be stipulated for every ton, or other portion of the ship's capacity, for the whole voyage; the payment must be according to the number of tons, &c. which the ship is proved capable of containing, without regard to the quantity actually put on board by the merchant, Abbott, 287; but, if the merchant has stipulated to pay a certain sum per cask or bale of goods, the payment must be, in the first place, according to the number of the casks or bales shipped and delivered; and, if he has further covenanted to furnish a complete lading, or specific number of casks or bales, and failed so to do, he must make good the loss which the owners have sustained by his failure, which will be a question for a jury: *ib.*

#### *Evidence for Defendant.*

The evidence for deft. may consist in rebutting the plt's proofs. The deft. may show, as a defence, that he derived no kind of benefit from the carriage of the goods; but, if he accept the goods, he cannot defend himself from the payment of the whole freight, on the ground of their being damaged, but must bring his cross action: 6 Taunt. 65; 12 East, 381; Doug. 272. And damage done to the goods by bad stowage cannot be given in evidence, either as a complete defence, or mitigation of damages, even though the damage exceed the amount of the freight: 4 Camp. 119; 7 East, 419; *sed vide* 4 Rob. 282. The deft. should not, in these cases, have accepted the goods, if he intended to discharge himself from payment of the freight: see 3 Chit. Com. L. 413. No freight is due where, by the sale of the goods, the voyage has been totally defeated, Dod. 317; yet, where the master, by most imperious necessity, was compelled to sell a part of the cargo, and there was a total absence of all fraud, but the \*expenses were incurred by the default of the defts., full [\*533] freight was allowed on the entire cargo; *ib.* 385; see 3 Rob.

180; 4 *ib.* 17, 77. No freight is recoverable if the voyage was prevented, upon its immediate commencement, without the deft.'s act; 4 Rob. 77. The deft. will be allowed to deduct, from freight decreed to the crown, moneys advanced to the master, to enable him to prosecute his voyage: Edw. A. Rep. 232. A covenant for payment of freight on delivery of goods, is not discharged by the master's taking from the freighter's agent a bill on a third person, which is not duly paid, although the agent fail with the account in his hands, 4 Camp. 257, *Taylor v. Briggs*, M. & M. 28, and see Holt. C. 72; but it would be otherwise, if, a cash payment being offered, the master preferred a bill, or the master should so act as to take the bill in full satisfaction of the freight, *ib.*, Holt, C. 75, 3 East, 147; see *Bovil v. Hammond*, 6 B. & C. 150, as to taking bill of consignee. Taking a bill from the consignee, drawn upon the consignor, but which the latter refuses to accept, is no answer to an action against the consignor: 8 T. R. 451; 2 Camp. 515. The master, by taking an indorsement on the charter-party, requesting the consignee to pay freight, and omitting to give notice of non-payment, does not discharge the consignor: 1 Taunt. 300.

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### GOODS SOLD, ACTION FOR.

FORM OF REMEDY FOR, AND PLEADINGS, 533.

PRECEDENTS, 535.

EVIDENCE FOR DEFENDANT, 543.

EVIDENCE FOR PLAINTIFF, *ib.*

*In Action for Goods sold and delivered*, 535 to 540.

*In Action for Goods bargained and sold*, 540 to 543.

*In Action for not delivering Goods*, 543.

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#### *Form of Remedy for.*

ASSUMPSIT, or debt, lies on a parol or written contract, not under seal for the price of goods sold; *ante*, "*Assumpsit*:" Fortes. 197; 2 T. R. 28. In general, where there is no contract of sale, these are not the appropriate forms of remedy, 3 Camp. 352, 4 Taunt. 189; but trover, or an action for deceit, &c., must be resorted to; but assumpsit sometimes lies for the value of goods obtained tortiously, 3 Taunt. 274, 6 T. R. 681, 2 T. R. 145; if, however, the plt.'s property in the goods be not clear and indisputable, it would be most advisable to sue on the tort: 1 B. & C. 418; 2 D. & R. 568, s. c. Assumpsit lies for goods as sold against a deft., who, by fraud, procured the plt. to sell to an insolvent goods which the deft. got into his possession: 3 Taunt. 274. Trover may be maintained for goods sold, but not delivered, by the vendee against the vendor; but this action will not lie if the goods be not set apart by the vendor, as it cannot be maintained but for specific goods: *Austen v. Craven*, 4 Taunt. 644; *Whitehouse v. Frost*, 12 East, 614; *Harman v. Anderson*, 2 Camp. 243.

#### *Form of Pleadings.*

The price of goods may be recovered under the common *indebitatus count*, in assumpsit or debt, if they have been actually delivered, and the

contract was to pay in money, and the time of credit be expired, *Mussen v. Price*, 4 East, 147, *Brooke v. White*, 1 N. R. 330, *Thompson v. Maceroni*, 2 B. & C. 2, 4 D. & R. 619, *Smith v. Chance*, \*2 B. [\*534] & A. 755; even though there be a special agreement between the parties: as, where A. agreed with B. to let him certain land, on condition that A. should have a moiety of the crops, for which purpose the crops were appraised for both parties, it was held that A. might declare on the general *indebitatus* count, without stating the special agreement, as the agreement was executed by the appraisement, and the action arose out of something collateral to it: *Poulter v. Killingbeck*, 1 B. & P. 397; *Leeds v. Burrows*, 12 East, 1. If goods are to be paid for partly in money and partly in goods to be delivered, the vendor must declare specially: 1 H. Bla. 287; Holt, C. N. P. 179; 3 Camp. 352. But where the plt. agreed to sell a horse to the deft., to be paid for partly by a horse of the deft. and partly by money, and the deft. delivered the horse, but refused to pay the money, the money may be recovered under the common count for goods sold: *Sheldon v. Cox*, 3 B. & C. 420; and see *Dunmore v. Taylor*, and *Hankey v. Smith*, Pea. Rep. 57. Where the contract is conditional, and in the alternative, it will be necessary to declare specially: *Davis v. Nicholls*, 2 Chit. R. 321; as, where deft. agreed for the purchase of 1000 bags of wheat, 40 or 50 of which were to be delivered on one market-day, and the remainder on another market-day, plt. could not declare absolutely for the sale of 40 bags on the first day, but the contract must be stated in the alternative, according to the original terms of it: *Penny v. Porter*, 2 East, 2; *Shipham v. Sanders*, *ib.*, 4 n.; *Miles v. Sheward*, 8 East, 8; *Tate v. Wellings*, 3 T. R. 531. Thus, where A. sells to B. beer in casks, giving him notice that, unless he returns the casks in a fortnight, he will be considered as the purchaser, and B. omitted to return the casks in the limited time, *Ld. Ellenb.* was of opinion, that he was not liable on a count for goods sold and delivered, the whole resting in special agreement, 2 Stark. 39; but it seems such common count will do where goods delivered on the terms of sale and return are detained an unreasonable time: Pea. Rep. 56. Where the whole credit has not expired, it is necessary to declare specially; as, where goods were to be paid for by a bill at three months, *Hoskins v. Duperoy*, 9 East, 498, *Lee v. Bisdon*, 2 Marsh. 495; and, where deft. agrees to pay in three months by bill at two months, the credit will not elapse till the expiration of five months, *Mussen v. Price*, 4 East, 147, *Mullar v. Shaw*, *ib.* 149, *Dutton v. Solomonson*, 3 B. & P. 582; and, where goods are to be paid for at six or nine months' credit, and they are not paid for at the end of six months, the credit will not expire till the end of the nine months: *Price v. Nixon*, 5 Taunt. 538. [Where goods were sold on the 5th of October, to be paid for in two months; it was held, that an action could not be maintained until after the 5th of December; and in such case the computation of time would be by calendar months, and to exclude the day on which the contract was made: *Webb v. Fairmanner*, 3 Mees. & W. 473.] But the price of goods may be recovered on the common count for goods sold, if, when the plt. declares, and at the time the declaration is correctly entitled, the credit has expired, though the writ was issued, and the deft. was arrested before: 4 East, 75; 11 East, 118. Where the sale was to the deft. and the delivery to a third person, at his request, the statement that the sale and delivery were to the deft. being

according to the legal effect, will suffice, 8 T. R. 328, 2 Show. 410, B. N. P. 136, 1 Str. 127; but a collateral undertaking to pay for goods sold to a third person must be declared on specially, 1 Saund. 211, *n. b.*; and, as to what is such collateral undertaking, *post*, "Guarantee." In an action against a broker under a *del-credere* commission, wherein the deft. became indebted to the plt., the declaration must be special, 1 Taunt. 279, 7 Taunt. 558, *s. c.*; but the common count for goods sold and delivered suffices sometimes, though deft. has prevented the delivery, and payment was not to be made till delivery, 5 B. & P. 638; 8 D. & R. 403. If the deft. has refused to accept the goods purchased, the price thereof may be recovered under the count for goods *bargained* and sold, 1 East, 194, Pea. Rep. 41, 7 T. R. 67, 6 B. & C. 393, 9 D. & R.; but it is usual to declare specially, and necessary to do so, if the goods have been re-sold, and plt. seeks to recover the difference between the price of the two

[\*535] sales: 6 Taunt. 162. The common count will not suffice \*if there has not been an actual sale, but merely a *contract* for sale: 6 B. & C. 393; 9 D. & R.; H. Bl. 316; 5 B. & C. 865; 8 D. & R. 693. When there is an entire contract for work, and labour, and materials, the latter cannot be recovered under the count for goods sold: 6 Taunt. 322; 1 Marsh. 581, *s. c.* Nor are fixtures, which are part of the realty, as trees, &c., recoverable under this count: 7 Taunt. 188.

It is not necessary to aver in the common count that the goods were "of the plt.," B. N. P. 139; and these words should be omitted on an action at the suit of an agent, broker, &c.: 5 Esp. Rep. 31, 32. In an action for goods sold and *delivered*, the omission of the words, at the deft.'s request, would be immaterial: 3 T. R. 30.

### Precedents.

#### ASSUMPSIT FOR GOODS, &C. SOLD AND DELIVERED TO THE DEFT.

(*The indebitatus count in assumpsit is as ante, 139, in debt as ante, 403, inserting these words:*) For divers goods, wares, and merchandise (or, if *animate property has been sold, say, "divers horses, &c., goods and chattels,"*) by the said plt., before that time sold and delivered to the said deft. and at his special instance and request; and being so indebted, &c. (*Conclusion in assumpsit as ante, 139, in debt, as ante, 409. The quantum valebant thereon is as ante, 139, inserting as follows:*) Had before that time sold and delivered divers other goods, wares, and merchandise, to the said deft., he, the said deft., undertook, and then and there faithfully promised the said plt. to pay him so much money as the said last-mentioned goods, wares, and merchandise, at the time of the said sale and delivery thereof, were reasonably worth, when he, the said deft. should be thereunto afterwards requested. And the said plt. avers, that the said last-mentioned goods, wares, and merchandise, at the time of the said sale and delivery thereof, were reasonably worth the further sum of £—, of like lawful money, to wit, at, &c., aforesaid, whereof the said deft., afterwards, to wit, &c., on, aforesaid, there had notice.

#### FOR GOODS BARGAINED AND SOLD.

(*The indebitatus count in assumpsit is as ante, 139, in debt, as ante, 403, inserting these words:*) For divers goods, wares, and merchandise, by the said plt. before that time, bargained and sold to the said deft., at the special instance, &c., of the said deft.; and, being so indebted, &c. (*Conclusion as ante, 139. The quantum meruit thereon is as ante, 139, inserting as follows:*) Had, before that time, bargained and sold divers other goods, &c. to the said deft., he, the said deft., undertook, &c. (*Conclusion as ante, 139.*)

See other precedents in assumpsit, for goods sold to deft., and delivered to a third person, 2 Chit. Pl. 56; for crops sold, &c. *ib.*, 57; for not delivering goods sold, *ib.*, 268; for

not accepting them, *ib.*, 264; for not taking away, *ib.*, 265; and the like where there has been a re-sale, *ib.*, 267; for not returning goods, or paying for them, *ib.*, 263; for not giving a bill on payment, *ib.*, 261; for not paying money on an exchange of horses, *ib.*, 274; or guarantee for goods sold, *ib.*, 314; on warranties, *post*, "Warranty."

*Evidence for Plaintiff.*

*In action for Goods Sold AND DELIVERED.*

*Contract of Sale.*] In an action for goods sold and delivered, or for goods bargained and sold, or for not delivering goods sold, a contract of sale between plt. and deft. must be proved. Such contract, in an action for goods sold and delivered, is proved by a written order, or by a parol one, or by presumptive evidence. In general, proof of the delivery of \*the goods to the deft., or his agent, and that he has [\*536] used them, is *prima facie* evidence of a contract, without proving any specific order: *Bennett v. Henderson*, 2 Stark. 550; *post*, 537. To support a claim for goods sold and delivered, however, the plt. need not prove an actual contract for the specific goods for which the action is brought: it will suffice to prove a dealing in the way of trade or business of the parties; and it will be sufficient to prove a dealing in the way of trade, where the deft. knew of and adopted the delivery of the goods. And where goods, delivered on sale or return, are not returned within a reasonable time, proof to that effect will be evidence of goods sold, and the value may be recovered: *Bailey v. Goldsmith*, Pea. Rep. 56; *ante*, 534. And, in some cases, where goods have been wrongfully taken, a contract for the purchase will be inferred, and plt. will recover on the implied contract: *ante*, 533. As to contract by agent, see *infra* and *post*, "*Principal and Agent.*"

*Proof of Delivery.*] To support an action for goods sold and delivered, it must be proved, not only that the property in the goods vested in the deft., but also that they were actually delivered, *Goodhall v. Skelton*, 2 H. Bl. 316, or virtually delivered; as, if deft. refused to accept them, or prevented the delivery: *Studdy v. Saunders*, 5 B. & C. 638; 8 D. & R. 403; *Rohde v. Thwaites*, 6 B. & C. 393; 9 D. & R. Plt. must show he has divested himself of all lien upon the goods, and that deft. might maintain trover for them, without paying, or offering to pay, the price: 2 H. Bl. 316; *Simmons v. Smith*, 5 B. & C. 865; 2 D. & R. 213; *Smith v. Chance*, 2 B. & A. 755; *Lorymer v. Smith*, 1 B. & C. 1; 2 D. & R. 23. The delivery should be proved to have been made or offered to deft. himself, or his authorized agent. Where A. agreed to sell B. certain goods, and earnest was paid, and the goods were packed in cloths furnished by B., and deposited in a building belonging to A., till B. should send for them, A. declaring, at the same time, that they should not be carried away till he was paid, it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered: *Goodhall v. Skelton*, 2 H. Bl. 316.

A delivery to a third person, or agent, according to deft.'s order, operates as a delivery to the deft.: 8 T. R. 328. Proof that a master, on former occasions, has empowered his servant to take up goods on credit, will be sufficient evidence of the servant to take up goods on a subsequent occa-

sion in an action against the master for goods sold and delivered: *Rusby v. Scarlett*, 5 Esp. Rep. 76; *Hazard v. Treadwell*, 1 Str. 506; *Gilman v. Robinson*, R. & M. 227. But a master is not responsible for goods ordered by his servant in his name, unless his authority to do so be shown by the master's having, on former occasions, authorized him: *Maunder v. Conyers*, 2 Str. 281; *Pearce v. Rogers*, 3 Esp. Rep. 214. When the master gives his servant money to pay for goods as he buys them, and the servant embezzles the money, the master is not liable: *Stubbing v. Heintz*, Pea. Rep. 47. It has been held that, where the vendee ordered the goods to be delivered to his agent, an acknowledgment by the agent of the receipt of the goods was evidence of the delivery to the vendee: *Biggs v. Lawrence*, 3 T. R. 454; but see *Bauerman v. Radenius*, 7 *ib.* 668.

Proof of a delivery to a carrier sometimes suffices. Where the vendee directs the goods to be delivered to a carrier, proof of such delivery will be evidence of a delivery to the vendee, *Dawes v. Peck*, 8 T. R. 330, *Dutton v. Solomonson*, 3 B. & P. 582; and a delivery, in general, to a carrier will be evidence of a delivery to the vendee, where no particular mode of conveyance is pointed out; the conveyance by the carrier is the best practical one, and that which is usually adopted: *Anderson v. Hodgson*, 5 Price, 630; *Groning v. Mendham*, 5 M. & S. 189; *Patterson v. Gandasequi*, 15 East, 62; B. N. P. 130; *Copeland v. Lewis*, 2 Stark. 39;

*Hart v. Sattley*, 3 Camp. 528. The goods, however, must be [\*537] proved to have been delivered to the carrier; proof of their having been left in an inn-yard, from which the carrier usually set out; will not be sufficient: *Selway v. Holloway*, 1 Ld. Raym. 46. A symbolical delivery will, in some cases, be tantamount to a delivery; as, where the goods are ponderous, by delivering the key of the warehouse wherein they are lodged, *Chaplin v. Rogers*, 1 East, 194, or by delivering the muniments of a ship, which will be equivalent to the delivery of the ship itself, 1 Atk. 171; or by the other *indicia* of property, *ib.* A delivery to a carrier by whom goods are usually sent by the plt. to the deft., is a delivery to the deft., *Hart v. Sattley*, 3 Camp. 528; and, where the goods are ordered to be sent by a carrier, and no one named, proof of delivery to a known and ordinary carrier operates as a delivery to deft. himself: *Dutton v. Solomonson*, 3 B. & P. 584; *Groning v. Mendham*, 5 M. & S. 189.

Proof of an order for goods, and a delivery to the deft.'s wife, is evidence of a contract with the husband, if the things came to the use of deft. and his family, *Gilb. Ev.* 184, and is, in all cases, strong presumptive evidence, where the parties cohabit, *ib.*, 1 Camp. 245; but the presumption of the husband's liability may be rebutted, by showing that the credit was given to her or that the husband supplied the wife with ready money; thus, giving notice that she was not to be trusted, or that he was ignorant that the goods were bought upon credit, *ib.*, Stark. Ev. 694, or by proof of any other circumstances negating the husband's assent, *Montague v. Benedict*, 3 B. & C. 691, 5 D. & R. 592; as where the wife has a sufficient allowance from her husband during his absence, of which the plt. has notice, *Holt v. Brien*, 4 B. & A. 252. And it is sufficient notice if the fact were notorious in the place where the transaction occurred: *Todd v. Stokes*, 1 Ld. Raym. 444. Where the husband and wife have lived separate for many years, and the wife has adequate resources of her own, the husband is not liable: see *post*, "*Husband and Wife*."

*Proof of a sufficient Delivery and Acceptance of the Goods under 29 Car. 2, c. 8, s. 17.]* In order to satisfy the Statute of Frauds, the plt. if he cannot prove a contract in writing, or a payment in earnest, and the goods be above £10 value, must prove that there was a delivery of the goods or part of them, and an acceptance by the deft. within the meaning of the statute; and, to satisfy such statute, there must be a clause of possession, and a delivery to vendee, with an *intention* of vesting the right of possession in him, and there must be an *actual acceptance* by the latter, with an *intention* of taking the possession as owner: *Phillips v. Bistolle*, 2 B. & C. 513; 3 D. & R. 827, s. c. Such intention is a question for a jury: *ib.*, 1 Moo. 328. Where goods of the value of £144, were made to order, and remained in the possession of the vendor, at the request of the vendee, with the exception of a small part, which the latter took away, it was held that there was no actual acceptance of the residue of the goods by the buyer under this section of the statute, and that plt. could not recover: *Thompson v. Maceroni*, 3 B. & C. 1; 4 D. & R. 619; *Smith v. Chance*, 2 B. & A. 753, 5. But, where the vendee, having purchased a quantity of balsam of Peru for £200, sent an agent with baskets for part of it, which was delivered, the delivery of such part of the goods was held to take the case out of the statute: *Descard v. Bond*, 7 G. 11, cited 2 Stark. Ev. 610. And an acceptance of a sample is, in many cases, sufficient; but the sample must, in this case, be considered as part of the bulk sold, and go to make up the quantity, 7 East, 558, *Holt's C.* 178, 1 Moo. 328; but, if it be delivered *merely* as a specimen, and form no part of the quantity, it will not be evidence of an acceptance of part: *Cooper v. Elston*, 7 T. R. 14; *Klinitz v. Surry*, 5 Esp. Rep. 267. An *actual* delivery is not, in all cases, requisite; though, indeed, the facts must be such that an actual acceptance and delivery may be presumed. In the case of ponderous or bulky \*goods, it is sufficient if any [\*538] act equivalent to delivery be done, "as where the vendor puts it in the vendee's power to take away the goods:" as by the delivery of the key of a warehouse, *Chaplin v. Rogers*, 1 East, 194, in which the goods are lodged, or by the delivery of other symbols of property, as the delivery of the muniments of a ship, *ib.*, 1 Atk. 171: or by accepting an order for the delivery, or by some act of the purchaser, such as measuring, &c. An order sent by the vendor to a wharfinger, &c., to deliver the goods, is sufficient to pass the property to the vendee, provided nothing remains to be done but to make the delivery: *per Gibbs, C. J., Withers v. Lys*, Holt, C. 20; *Lucas v. Dorrien*, 7 Taunt. 289. Therefore, where the buyer received from the seller an order on his warehouseman to deliver the goods, it was held to be a sufficient proof of delivery within the statute to dispense with written evidence, &c.: *Searle v. Keens*, 2 Esp. Rep. 598. But, where the vendee received from the seller a delivery-order for a hogshead of wine in the warehouse of the London Dock Company, which he presented, but which he said he had lost, and then declined taking the wine, this was held not to be a sufficient acceptance, within the statute, as there could not have been *any actual acceptance* of the wine by the vendee, until the Dock Company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee, they having held it originally as agents of the vendors, and as long as they continued to hold it, the property was unchanged: *per Cur. Benstall v. Burn*, 3 B. & C. 426; 5 D. & R. 284; R. & M. C. 107,

s. c. An order by the deft. to send the goods to a certain quay, to be left till called for, without a reception and actual acceptancy on the part of the deft., is not a sufficient acceptance, *Anderson v. Hodgson*, 5 Price, 630; nor will the removal of goods in the vendor's own boat, to another warehouse of his own, or his agent's on the way towards the deft.'s residence, by the direction of the latter, amount to a delivery, *Astley v. Emery*, 4 M. & S. 262. The word *accepted* imports not merely that there should be a delivery by the seller, but that *each party* should do something by which the bargain should be bound, *per Abbott, C. J.*, 3 B. & A. 682, as exercising an act of ownership. "Where goods have been weighed and measured, *by order* of the buyer, and in his presence (so that he cannot afterwards object to the quantity or quality,) this may be considered a sufficient evidence to bind him:" *Simon v. Metiver*, 1 W. Bl. R. 601; *Elmore v. Thurl*, 1 Taunt. 459; 2 Ph. Ev. 91. So, if the buyer *write his name* on an article of goods, at the time of purchase, it is sufficient if, (as observed by *Ld. Ellenb.*) the deft.'s purpose in writing upon it was thereby to denote that she had purchased it, and to appropriate it to her own use, but it will be no evidence as to the other articles, on which the deft. has not written her name: *Hodgson v. Brett*, 1 Camp. 233. And, in *Stoveld v. Hughes*, 14 East, 312, *Ld. Ellenb.* observed, "The change of mark from A. to B., on bales of goods, in a warehouse, by the direction of the parties, was clearly held, by the House of Lords, in a late case, to operate as an actual delivery of the goods." So, where the party assented to the sale of timber, and its being marked by the plt.'s agent, it has been held a sufficient delivery, *ib.* 316, 7. And evidence that the vendee had exercised acts of ownership, will sometimes be sufficient to warrant a jury in finding that a delivery and acceptance had taken place; as, where vendee had actually sold part of a stack of hay: 1 East, 192; B. & C. 411. And, where plt., having agreed to purchase a horse, saying that he had no stable of his own, directed that plt. should keep it at livery, whereupon plt. removed it to his livery-stables, and an expense was incurred by deft. for his keep, it was held that there was a change of possession, and that it amounted to a delivery within the statute, *Elmore v. Stone*, 1 Taunt. 468; but in *Howe v. Palmer*, 3 B. & A. 324, the correctness of the decision was doubted by *Bayley, J.*

[\*539] But, where there had been a verbal bargain for a horse, for £30, but no time fixed for payment, the horse having been fired by deft.'s consent, and plt.'s servant, by deft.'s order, took it to grass to Kimpton Park, *Abbott, C. J.*, said, "If, indeed, it had been sent there, and entered in the deft.'s name, by his directions, I should have thought it would have amounted to an acceptance by him. But here it was entered in the plt.'s name, and the plt.'s character, as owner, remained unchanged;" and it was held to be no acceptance: *Carter v. Tuissaint*, 5 B. & A. 858. But it is material that the making, weighing, and marking, &c., by the deft.'s orders, be done by some clear and unequivocal act, in such manner as to show that he thereby intended to appropriate the goods to himself; "for supposing that directions were given at the time by the buyer to the seller's agent, to measure the goods for him, that would not make him the agent of the buyer, so far as to make that act amount to an acceptance on his part; for an authority to measure the goods would not give him an authority to accept:" *per Holroyd, J.*, 3 B. & A. 325. And so in the case of ready money sales, it must appear that the



seller thereby parts with the lien which he has on the specific goods, in which case it is material to ascertain if there has been a change of possession. And the selecting and cutting goods by deft., and also measuring and marking them in *plt.'s shop*, is not a sufficient acceptance, within the statute; for, as said *per Holroyd, J.*, "it contemplates a parting with the possession, and, therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own:" *Baldey v. Parker*, 2 B. & C. 44; 3 B. & C. 1. And, where A. agreed to purchase a horse from B., for ready money, and to take him within a certain time, and, about the expiration, A. rode the horse, and gave directions as to its treatment, but requested that it might remain in B.'s possession, it was held not to be an acceptance with the statute, "as deft. had no right of property in the horse until the *price was paid*, that being an act concurrent with the delivery, and could not exercise any right of ownership."—"Plt. had a lien for the price:" *Tempest v. Fitzgerald*, 3 B. & A. 683, 4. So, where there had been a verbal bargain for a horse, at £30, for the payment of which no payment was fixed, though it had been previously fixed by deft.'s order, here the plts. had a lien on the horse till the price was paid: 5 B. & A. 858. There can be no actual acceptance so long as the buyer continues to have a right to object, either to the quantity or quality of the goods; so that, where goods are forwarded to deft. according to his direction, by a carrier, still it is not a sufficient acceptance to satisfy the statute. Thus, where A., having sent to B. a bale of sponge under a verbal order from the latter, which B. returned, and at the same time wrote to A., stating that he disapproved of it, it was held, that there had been no acceptance of the goods within the statute: *Kent v. Huskinson*, 3 B. & P. 233. And, where plt., a merchant in London, had been in the habit of shipping goods to deft. at Barneley, and the usual course was to deliver them at the wharf of one S., in London, to be forwarded by the first vessel, it was held, that the acceptance of the teas by the wharfinger, for being transmitted, "was not sufficient, not being the party himself," and that he still continued "to have a right to object either to the quantum or quality of the goods:" *per Abbott, C. J.*; *Hanson v. Armitage*, 5 B. & A. 559; see, also, 3 B. & A. 321; 2 B. & C. 37; 3 *ib.*, 1; 4 M. & S. 262. The case, in 3 Camp. 528, and other similar cases, appear to be overruled. And, where goods at an auction were knocked down to deft., and handed to him, and he retained them a few minutes, and returned them, it was held not to be a sufficient acceptance, the conditions of sale being, that a deposit was to be paid, and residue of the price to be paid before they were removed: *Philips v. Bistoli*, 2 B. & C. 511; 3 D. & R. 822.

\* *Plaintiff's Property in the Goods.*] In an action for goods [\*540] sold, it must appear that the plt.'s title to the property is undisputed; therefore, where a plt. in an action for goods sold and delivered, proved the possession of the goods by himself, and their removal by the defts., and it appeared that the goods consisted of spar, lying on the lands of A., and that the plt. claimed under A. by a written agreement not produced, held, that this was not a sufficient proof of title to the goods, from which a contract between the parties could be implied: *Lee v. Shore*, 1 B. & C. 94; 2 D. & R. 198. The plt.'s property in goods, however, will, in general, be sufficiently proved by the contract of sale, his possession of them

being sufficient: see B. N. P. 139; *Temple v. Brown*, 6 Taunt. 65; 5 Esp. Rep. 31. As to when an agent, &c. may sue, see *post*, "*Principal and Agent*."

*Price of Goods.*] If there was a specific price agreed upon, the agreement to that effect should be proved; if not, the value of them must be proved: *Bluett v. Osborne*, 1 Stark. 384. Where, in assumpsit for goods sold, at the suit of a liquor-merchant, the only evidence of their value was that of his servant, who spoke only to the delivery of several hampers of bottles, but could say nothing as to their contents, the jury were directed to presume that the bottles were filled with the cheapest liquor the plt. dealt in: *Clunnes v. Pezzey*, 1 Camp. 8.

*Evidence in Actions for Goods BARGAINED AND SOLD.*

*Contract of Sale under Statute of Frauds.*] A contract of sale must be proved; and if the goods be above £10 in value, and there has been no part-acceptance, and receipt by the vendee of the goods sold, or nothing given in earnest, or in part payment of the price, such contract must be proved to have been in writing, signed by the deft. or his agent, 29 Car. 2, c. 3, s. 17. The words of that act are, that no "contract for the sale of any goods, wares, and merchandizes, for the price of ten pounds or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing, of the said bargain, be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It is now settled that there is no distinction between *executory* and *other contracts*, *Rondeau v. Wyatt*, 2 H. Bl. 63, *Garbutt v. Watson*, 5 B. & A. 613; and a sale of goods, to be paid for on delivery, is within the statute, whether they be prepared or not at the time of sale. The act, however, is confined to contracts relating to the mere sale of *goods*, and does not apply to contracts strictly for work, and labour, and materials, as a contract to *make* or build a ship, carriage, &c.: *Towers v. Osborne*, Str. 506; *Cooper v. Elston*, 7 T. R. 17; 3 East, 303. It has been held, that an agreement to procure coals at Blythe, and convey them to Ipswich, need not be in writing, under the statute, but might be proved by parol; and "this falls within the distinction taken in all the cases, and is not a contract to sell, but to provide coals, and afterwards to carry them to Ipswich:" *Cobbold v. Caston*, 1 Bing. 401. A sale of oak-pins, not then in existence, but to be cut out of slabs, &c., is not within the act: *Groves v. Buck*, 3 M. & S. 179. But a contract with a miller for the sale of flour, not then ground, is a sale of *goods*, &c., within the statute; for plts. were proceeding to grind the flour for the purposes of general sale, and sold this quantity as part of their general stock; *per Abbott, C. J.*, *ib.* And the doctrine laid down in *Clayton v. Andrews* was overruled, *ib.* Such sale must be proved by a *note*, &c.: 2 H. Bl. 63. A sale of goods [\*541] where \*a higher price is given, on account of their carriage being at plt.'s expense, is within the statute, and seems not to be a mixed contract, there being no separate charge for the delivery: *Astley v. Emery*, 4 M. & S. 262.

The goods must be of the price of £10, and form an entire contract at that price. Where, on the same day, and at the same meeting, the deft.

contracts for the sale of various goods, exceeding £10, the circumstance of a separate price under £10 being fixed upon each article, is within the statute; and it would seem that, even if deft. left the shop for a short time, "if his return was soon enough to warrant a supposition that the whole were intended to be one transaction, it would be an entire transaction, and within the statute:" *per Bayley, J., Baldey v. Parker*, 2 B. & C. 37, 42. But it has been held that, at a sale by auction, a distinct contract arises on the sale of each, and though there be different lots, amounting in all to £10: *Emerson v. Heelis*, 2 Taunt. 38. Upon a contract for 24 numbers of a periodical work, to be delivered monthly, at £1. 1s. a number, the plt. may sue for the numbers actually delivered, though the contract be not in writing, for the meaning of such contract is, that the publisher shall be paid as the numbers come out: *Mavor v. Pyne*, 2 Bing. 285, 288; and see *Price v. Lea*, 1 B. & C. 156; 2 D. & R. 295; *Mavor v. Pyne*, 11 Moo. Rep. 2.

The statute does not require any particular form of contract; a note, or memorandum in writing, of the bargain, is sufficient. No particular consideration need be expressed in it, like that required in an agreement under the 4th section, as *post*, "Guarantee:" *Eagerton v. Mathews*, 6 East, 307. But the writing must show the price for which the goods were sold, *Elmore v. Kingscote*, 5 B. & C. 583, 8 D. & R. 343, and the names of both parties must appear on it: *Champion v. Plumer*, 1 N. R. 252; *Cooper v. Smith*, 15 East, 103. But the party to be charged need only sign it: *Allen v. Bennett*, 3 Taunt. 169; *Egerton v. Mathews*, 6 East, 307. A bill of parcels, in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of the goods, is a sufficient memorandum: *Saunderson v. Jackson*, 2 B. & P. 232. So, in a bill of parcels, in which the name of the vendor is printed, and that of the vendee written by the vendor: *Schneider v. Morris*, 2 M. & S. 286. So is a memorandum written by deft., beginning, "I, A. B., agree," &c., though he never formally sign it: 1 Esp. Rep. 120; 2 B. & P. 239.

A mere proposal of sale or purchase is not sufficient: P. Ch. 27. It is not necessary that the whole of the terms of the sale should be comprised in one memorandum; it is sufficient if they can be collected or fairly inferred from several distinct writings, having reference to the same agreement, or from subsequent letters, whereby the transaction is admitted: *Jackson v. Lowe*, 7 Moo. 219; 1 Bing. s. c. Where goods are sold by auction to an agent, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, on the printed catalogue, and the principal afterwards, in a letter to the agent, recognized the purchase, it was held, that the entry in the catalogue, and letter coupled together, were a sufficient memorandum of the contract, within the act: *Phillimore v. Barry*, 1 Camp. 513. Where, however, there is a prior insufficient or unsigned written contract, the plt. cannot avail himself of a subsequent letter of deft., in which, though the order of the goods be recognized, the terms of the contract are renounced or disaffirmed: *Cooper v. Smith*, 15 East, 103; *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343, s. c.

The *agent* contemplated by the act, whose signature is to bind the deft., must be some third person, and not the other contracting party, even though by the express direction of the other he act as agent: *Wright v.*

*Danner*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & A. 393; *Rayner v. Linthorne*, 2 B. & P. 124. The agent's authority need not be in writing: 1 Esp. 106; 1 Sch. & Lef. 22. An auctioneer, at a sale [\*542] by public \*auction, is an agent for the buyer: *Emmerson v. Heelis*, 2 Taunt. 38. A mere sub-agent, without express authority from the principal, is not a sufficient agent to bind him: *Henderson v. Barnewall*, 1 Younge & J., 387. Where a person is told by two parties that he is to be the broker, to make a contract between them for the sale of goods, and he in consequence reduces it into writing, and sends a sale-note of the terms to each party, this is a sufficient note or memorandum within the act: *Chapman v. Partridge*, 5 Esp. Rep. 256. An entry by a broker of a contract made in his book, which he did not sign, but sent to the vendor and vendee bought and sold notes, copied from the book, and signed by him, it was held this was sufficient to bind the parties: *Groom v. Afflalo*, 6 B. & C. 117; 9 D. & R. 148, s. c. And, where a broker is authorized by one person to sell goods, and by another to buy them, an entry made by him in his sale-book, of such sale, and signed by him, is sufficient: *Heyman v. Neale*, 2 Camp. 337; and see *Thornton v. Kempster*, 1 Marsh. 355; 5 Taunt. 786, s. c. Where a broker employed to effect a sale of goods for his principal, made a verbal contract with the vendee, and, after entering it in his own book, without signing it, delivered a bought-and-sold note to the vendor and vendee respecting it, each paper differing in its terms, it was held, there was no sufficient memorandum in the act to bind either party: *Grant v. Fletcher*, 5 B. & C. 436; 8 D. & R. 59, s. c.

*Proof of Delivery and Acceptance of Part of the Goods by Defendant.*] If the plt. cannot, in an action for goods bargained and sold, above the price of £10, prove a contract in writing, he must prove a part delivery and acceptance of the goods, or else a payment in earnest, or of part of price, to bind the bargain: see *ante*, 537, as to what is an acceptance.

*Proof of Payment in Earnest to bind the Bargain, or a part Payment.*] There must be an actual transfer of the thing given: if a purchaser of goods draws the edge of a shilling over the hand of the vendor, and returns the money into his pocket, it is not an earnest or part-payment to satisfy the statute: 7 Taunt. 597. The delivery of a bill or note, in part-payment, is sufficient to take the case out of the act: *Chit. B. 97*. If any part of the price is paid down, if it is but a penny, or any portion of the goods is delivered by way of earnest, it is sufficient: 2 Bl. Com. 447. The thing must be given as a token of ratification of the contract: 5 Co. R. 117.

*Proof of Plaintiff's readiness to complete Sale.*] This must be established. If, by the terms of the sale, deft. is to take away the goods, as is usually the case, unless otherwise agreed, plt. will merely have to prove the bargain and sale: *Rawson v. Johnson*, 1 East, 203; *Wilks v. Atkinson*, 1 Marsh. 412; *Waterhouse v. Skinner*, 2 B. & P. 447. But, if the plt. was bound, as in general he is, to deliver the goods, he must prove his readiness and offer to deliver: 5 East, 107. Where there is an entire contract for a specific quantity of goods, the vendee is not bound to receive part: and, though part be delivered, he is not liable to pay for the same,

if willing to accept and pay for the whole: 2 N. R. 61; 2 Stark. 281; 1 Camp. 33; 6 Moo. 114, *post*. And the buyer of goods, by sample, has a right to inspect the whole in bulk, at any proper and convenient time, and may rescind the contract if the seller refuse to show it; 1 B. & C. 1; 2 D. & R. 29, *s. c.* Where goods are bought at a public auction, and one of the conditions of sale is, that the goods shall be taken away at the buyer's expense within fourteen days, and afterwards a bought note is entered into, with this clause, "fourteen days for receiving and delivery," the meaning of the true contract is, that fourteen days shall be allowed to the purchaser only, and the vendor is bound at all times to be ready to deliver: 1 Marsh. 514.

**\*Damages.]** The plt. will be entitled to recover the price of [\*543] the goods sold, though they have not been delivered. If the article has been re-sold, as it may be if the deft. refuses to complete the sale, and the article has never been absolutely vested in the deft. *Bloxam v. Sanders*, 4 B. & C. 945, 7 D. & R. 896, 6 M. & S. 4, *Greaves v. Asplin*, 9 Camp. 426, such re-sale should be proved, as also the difference arising thereon, and which difference plt. will, in general, be entitled to recover. If there has been any expense in returning the goods, &c. the same should be proved, as stated in the declaration.

*Evidence in Action for NOT DELIVERING GOODS Bought.*

**Contract of Sale, &c.]** In this action, the contract of sale by the vendor must be proved in the same way as in an action for goods bargained and sold, as *ante*, 540.

**Plaintiff's readiness to complete Sale, and accept the Goods.]** If the goods have been paid for, the payment should be proved, *post*, "*Payment*." If the goods have not been paid for, and no credit was agreed on, the plt. must prove a tender of the price: Hob. 41; *Smith v. Caffin*, 2 Bl. C. 448; *post*, "*Tender*." In an action, however, for not delivering goods which the deft. had undertaken to deliver, on request, at a certain price, it is sufficient to prove a readiness and willingness to receive the goods, and to pay for them according to the sale, but that the deft. refused to deliver them, without proving an actual tender: *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447; 1 Marsh, 512. If the contract be to deliver goods generally, or upon request, a special request to deliver them must be proved, either personally or by letter, *Back v. Owen*, 5 T. R. 409, or by his agent, 3 Price, 68; but proof of an absolute refusal by deft. to deliver, or that he had incapacitated himself from so doing, as by reselling, &c., would dispense with proof of a request to deliver: 10 East, 359; *Amory v. Brodrick*, 5 B. & A. 712; 1 D. & R. 361.

**Damages.]** In an action for not delivering goods on a given day, the measure of damages is the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered, 2 B. & C. 624, 4 D. & R. 161; and this, although the plt. in the interim had re-sold, and refused to complete, if the plt. did not rescind the contract: *Leigh v. Paterson*, 8 Taunt. 540; 2 Moo. 588, *s. c.*

*Evidence for Defendant.*

The evidence for the deft. will, in general, consist in rebutting the plt.'s proofs of the contract of sale, or the delivery or the validity of the contract, under the Statute of Frauds, or in reducing damages.

In an action for goods sold and delivered, where the plt. relies on a *quantum meruit*, and no price has been agreed on, it seems that the deft. may give evidence of the badness of the article, in reduction of damages, to the extent of the real value: *Basten v. Butler*, 7 East, 479; *Farnsworth v. Garrard*, 1 Camp. 38. He should, therefore, call witnesses to prove the badness and real quality. He need not, in such case, give the plt. notice of his intended defence: *ib.* 1 Camp. 38. And, in cases of this kind, the deft. may prove the bad quality of the article supplied, even as an answer to the whole demand, if he has derived no sort of benefit from them: *Fisher v. Samuda*, 1 Camp. 191; *Groning v. Mendham*, 1 Stark. 257; 3 Stark. 32. And, where the goods have been sold by *sample*, or otherwise, at a *specific price*, and the question was whether the deft. was compellable to pay the full price, or might prove, in diminution [\*544] of \*damages, that the goods did not correspond with the sample, but were of inferior quality, it was held he might, and that the plt. could only recover their actual value: *Germaine v. Barton*, 3 Stark. 32; and see note, *ib.* 2 Stark. 6. And, if the deft. use an article for the purpose of a *reasonable* trial of its fitness, &c., that will be a question for the jury; and if, on such trial, they were found unfit for the intended purpose, and no notice thereof was given to plt., the deft. will not be liable for *price originally stipulated*, but merely for the *value* of the materials: *Okell v. Smith*, 1 Stark. 107; see also 1 Saund. 320, *b.* 1, *n.* But, if there be a specific price agreed on, deft. should give plt. notice of his intended defence: *Basten v. Butler*, 7 East, 479; 3 Stark. R. 32. It seems, the bad quality of the article will not form any ground for reducing the claim, if a bill of exchange has been given for it; and, in such a case, deft.'s only remedy, if any, is by cross action, see 1 Camp. 40, *n.* 2 *ib.* 346, 3 *ib.* 38, 14 East, 486, unless the sale was fraudulent, and deft. properly repudiated it, 3 Stark. 175, *infra*. And, if the deft. has proceeded to use the goods, though warranted, without any notice to the plt. of their inferiority, and so deprived him of the means of ascertaining their real value, the plt. may recover his whole demand, and deft.'s only remedy is by cross-action: *Hopkins v. Appleby*, 1 Stark. 477.

Deft. may show that the sale was *fraudulent* or illegal: see *ante*, "*Fraud*," and *post*, "*Illegal Consideration*." The employment of puffers at an auction, not for the defensive purpose of protection against a sale at an undervalue, but to extort a high price, by taking advantage of the eagerness of the bidders will sometimes invalidate the sale, on the ground of fraud, Chit. Cont., 227, Sudg. V. & P. 18, &c., Cowp. 394, 6 T. R. 642, 3 Ves. jun. 630; and, where the condition of sale is, that "the highest bidder shall be the purchaser," a puffer cannot be legally employed, see 2 C. & P. 208, and cases there collected; and *Crowder v. Austin*, 3 Bing. 368; 2 Carr. & Payne, 208; *Meadows v. Tanner*, 5 Madd. Rep. 34. Where a bill was given for the price of a horse, *fraudulently* sold under a warranty, the breach of the warranty was held to be a bar to an action on the bill, the deft. having rendered back the horse, and

repudiated the contract: 2 Taunt. 2, 3; Stark. 175. A mere loose or general false assertion of the vendor, as to the value or quality of the goods, being a matter of judgment, and the truth of which the vendee might ascertain, and might embody in his contract, would hardly be deemed sufficient to constitute a case of fraud, to defeat the contract: Sudg. V. & P. 1; and Chit. Cont. 13. If a party sell goods, to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectations of receiving them by consignment, but means to go into the market to buy the goods which he has contracted to deliver, he cannot maintain an action on such contract: *Bryan v. Lewis*, 1 R. & M. 387.

Def't. may show that the action was brought before the credit expired, and thus nonsuit the plt. as *ante*, 534; as to proof of commencement of action, *ante*, 162. Def't. may show that a negotiable bill of exchange, not yet due, has been given to the amount: see *ante*, 28. The vendor may sue for the price of the goods, though a bill of exchange was given, provided such bill be dishonoured; but, whilst it is current, such action is not maintainable, 7 Taunt. 397, 7 T. R. 64, 5 T. R. 513, see 1 M. & S. 223, unless, perhaps, in cases of fraud. And, where the def't., being indebted to the plt. for goods sold, indorsed to him, in blank, a bill of exchange not due (drawn and accepted by two other persons,) to a greater amount than the price of the goods, and the plt. gave the def't. the difference in money, and the plt. lost the bill before it was paid, it was held he could not sue the def't. for the price of the goods or the lost bill: 3 B. & B. 235.

In an action for *not accepting goods*, or for *goods bargained and sold*, the contract, &c., may be disproved. Where an entire contract for goods is performed in part, no action will lie in respect of what has been done, until \*after the expiration of the time fixed for the [\*545] completion of the whole; but, when some of the goods have been delivered, and the vendee does not return them, on the failure of the vendor to perform his part of the contract, the latter may bring an action for the value, not the stipulated price, of those goods, though he is liable in a cross-action for the breach of his contract: *Shipton v. Cassan*, 5 B. & C. 383; 8 D. & R. 130; but see *Walker v. Dixon*, 2 Stark. 281, *ante*, 542.

In an action against the vendor for *not delivering goods*, he may disprove the contract of sale, &c., or the plt.'s compliance with the conditions of the sale, as the payment of the price, &c.: *ante*, 543. Where the vendor's engagement to deliver is absolute, it is no defence that he was prevented from completing the bargain by inevitable accident: 10 East, 530; 2 Camp. 57, n. On a sale of goods (expected by a particular ship) "on arrival," if no goods arrive in the ordinary course of trade and navigation, the vendor, (def't.) is not, in general, liable, the contract being conditional, 2 Camp. 326, n., 3 *ib.*, 274; but, where the contract was "for goods to be sent to the vendee on an insurance being effected, terms, three months' credit from the time of *arrival*," and which insurance was effected in the name of the vendee, it was held, the property in the goods vested in him immediately they were forwarded, and in the course of the transit, and were then at his risk: 4 B. & C. 219; 6 D. & R. 283, s. c.; and see 2 Camp. 56; 6 B. & C. 360.

For other defences, see the various titles throughout the work.

GRANT.—See *ante*, 370, 455, 476, "PRESUMPTIVE EVIDENCE."

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GUARANTEE, ACTION ON.

FORM OF REMEDY AND PLEADINGS, 545.

PRECEDENTS, 546.

EVIDENCE FOR PLAINTIFF, *ib.*—*Proof of the Contract in writing, under Statute of Frauds, ib.*—*What Contracts within the Act, ib.*—*What sufficient Contract in Writing*, 548.—*Stamp to*, 551.—*Plaintiff's Performance of Contract, ib.*—*Breach, ib.*—*Damages, ib.*

EVIDENCE FOR DEFENDANT, 552.

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**FORM OF REMEDY.]** The mode of enforcing a contract of guarantee by action is by a special action of assumpsit, which is the only remedy when the contract is not under seal: 2 Saund. 62, *b.*; 1 Chit. Pl. 91; 2 Vent. 39. Debt does not lie: Hardw. 486; Com. D. *Debt*, B. 2 B. & P. 83. If the contract be under seal, then the form of the remedy must depend on the nature of such contract: see "*Debt*," "*Covenant*."

**FORM OF PLEADINGS.]** The declaration must be special, and the common counts will not suffice: *ante*, 534. It must, as in other cases, sufficiently set out the consideration, the undertaking, and the breach: *ante*, "*Assumpsit*." In an action on a promise to pay the debt of [\*546] another \*person, in consideration of forbearance, though some demand recoverable at law or in equity must be stated, it is not necessary to state the subject matter of the debt, *Barrell v. Trussell*, 4 Taunt. 117, and unnecessary particularity should be avoided: Peak. Rep. 117. Though a large sum be stated under a *videlicet* to be due, it need not be proved: 8 Taunt. 197, 2 Moo. 114, *s. c.*; see *ante*, 479. The contract must be correctly set forth, or a variance will be fatal: *ante*, 116 to 125. Where the declaration stated that the defts. undertook to indemnify A. from holding goods in his warehouse on their behalf, and, on production of the written guarantee, it appeared that the defts. only guaranteed him for holding the goods in his warehouse on their behalf, it was held that this was no variance, as it must be implied he was to deliver them up to the defts.: 4 Moo. 515; and see 1 B. & C. 18. The contract need not be stated to have been in writing, under the Statute of Frauds, though it is said to be otherwise in a plea: 1 Saund. 276, *a. n.* 2; 4 East, 400. If the defts. contract was to pay the debt of a third person on request, such request must be averred and proved: Cro. J. 506; Owen, 109; 1 Saund. 32, *n.* 2; 2 B. & C. 685; *ante*, 131; *sed vide* 1 Str. 88, 9. A breach assigned in the words of the contract of a guarantee will suffice: *ante*, 133. If the deft.'s promise was to pay the debt of a third person, a breach that the deft. did not pay it will suffice, 1 Sid. 178, 2 Rol. 738; but, if the matter to be performed by the deft. depend on some other event, it seems proper, not merely to assign the breach in the terms of the



contract, but first to aver that such event took place, 6 Taunt. 45, as in debt on a bond conditioned that a collector of poor-rates should render an account of moneys received, it should be averred that he did receive moneys, and then that he did not render an account thereof: *ib.*, *sed vide*, 1 Price, 109; and see further, *ante*, 133.

To an action on a guarantee, if the promise be not in writing, the deft. may either plead the Statute of Frauds, but the plea must be so framed as not to amount to the general issue, 1 M. & P. 294; or he may avail himself of it as an objection at the trial, which is the more usual method; but it will be too late after verdict, as it shall be then intended that the promise was in writing: *Ran v. Hughes*, 7 T. R. 350, *n.* (a.)

[If the plea, in an action on a promise to pay the debt of another, be that no note in writing was signed by the defendant or any other person for him, it seems that the plaintiff cannot take issue, but must set out the agreement in his replication: *Lowe v. Eldred*, 3 Tyr. 234; 1 C. & Meeson, 239.

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### *Precedents.*

The form of the declaration must so depend on the particular facts of each case, that none can be usefully given as a general precedent; see form of declaration on a guarantee to pay money, in consideration of forbearance, to a third person, 2 Chit. Pl. 252; the like, to pay money, in consideration of a sale of goods to a third person, *ib.*, 314; the like, for not indemnifying plt., who had guaranteed deft.'s debt, *ib.*, 318.

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### *Evidence for Plaintiff.*

The plt. should be prepared to prove the inducements, if any, stated in the declaration; the deft.'s contract within the Statute of Frauds; the plt.'s performance of the contract; the breach, and damages.

*Inducement.*] The inducement, if any, stated in the declaration, should be substantially proved; and, if stated as matter of description, must be literally proved: see *ante*, 112. In an action on deft.'s guarantee to pay the debt of a third person, though a larger sum be stated to be due to plt. from such third person, the exact amount of such sum need not be proved: 8 Taunt. 197; 2 Moo. 114, *s. c.*

*Proof of the Contract.*] The Fourth Section of the Statute of Frauds, \*amongst other things, enacts, that "no action shall be [\*547] brought to charge the deft. upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This clause of the section applies to cases where the credit has been given to another person, and the payment guaranteed by the deft.; and it is immaterial whether the promise or guarantee be made, or the goods furnished, before the debt has been contracted, or afterwards: "for, if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt, must be in writing, otherwise it is void, by the Statute of Frauds," *per Buller, J.*, 2 T. R. 80, 3 C. &

P. 130; and see 1 M. & P. 130; and the question as to whom the credit is given is the criterion by which the application of the statute is to be regulated; for it applies even where the plt. says to deft., "I will not sell him (meaning third person) the goods, unless you will undertake that he shall pay me for them;" but, if he refuses to deliver the goods to such third person, and deft. undertakes *absolutely* to pay, it is otherwise, 1 Esp. Rep. 121, 2 Ld. Raym. 1087, 1 Salk. 27, *s. c.*, or, if the deft. merely order the goods to be sent to such third person, it would be otherwise, as the credit would then be given to deft. *alone*: *ib.*, 1 Saund. 211, *b.* The question as to whom the credit is given is a *question of fact for the jury*, to be collected from the whole transaction, 1 H. Bl. 120; 5 Taunt. 450; and the delivery of the goods having been made before the guarantee, has been held as the strongest *presumption* of the credit not having been given to deft., 1 Burr. 373, but is not conclusive, *Keate v. Temple*, 1 B. & P. 158. And, where deft. is under a legal obligation to pay, as, for expenses in the care of a pauper, the statute does not apply, and a written promise is unnecessary; B. N. P. 281; 3 B. & P. 250; 4 M. & S. 275. And, where plt. advanced money on promise to his grandson, an infant, it is not within the statute; for, as the infant is not liable, it will be presumed that the credit was given to the deft.: 1 Burr. 373. And, where a person undertook to complete a certain work in the deft.'s house, and, being unable to supply the timber, the deft. undertook to pay for it out of the money he had to pay him when the house was finished, this was held to be a direct, and not a collateral undertaking: 2 Bing. 439. An undertaking by the deft. that, if the plaintiff would lend his gelding to a third person, deft. would re-deliver it, is within the statute, and should be in writing: 1 Ld. Raym. 1085; Salk. 27. [See *Simpson v. Penton*, 2 C. & Mee. 430.] Where the original transaction is altered, and a new consideration, moving from the plt. to the deft., takes place, a promise made by the deft. to the plt. will not be within the statute; as, where the plt. (a broker,) having a lien on some policies of assurance effected for his principal, for whom he had given his acceptances, the deft. promised, in consideration of his giving up the policies, that he would provide for the payment of those acceptances as they became due, this was held to be a promise not within the statute, and the plt. was therefore allowed to support it by parol evidence: *Castling v. Anherst*, 2 East, 332; 3 Burr. 1886; 3 Esp. Rep. 87; 4 Taunt. 117. And a parol promise to a broker to provide for bills he had for his principal, if the broker would give up certain policies of assurance whereon he had a lien, is not within the statute: 5 Taunt. 450. And where the plt. distrained for rent, and the deft. (an auctioneer,) being in possession of the goods, and about to sell them for the benefit of the creditors, by virtue of a bill of sale made by the tenant, promised to pay the debt, 2 Wils. 308; so a promise to pay a debt, in consideration that the plt. who had taken his debtor in execution on a *ca. sa.*, would agree to his discharge, is a promise not within the statute, the discharge operating as an extinguishment of the debt; 1 B. & A. 297; see the cases cited at length, S. N. P. 831, &c.

\* *The Form of the Note, &c. in writing*, is not very material; [ \*548 ] it should, however, be under the hand of the deft., and contain the names of the contracting parties, the contract, the considera-

tion: a bond, or other contract, under seal, or of record, is not within the act; a guarantee of a debt generally, without saying how much, is valid, 15 East, 272; see *ante*, as to cases of this kind, under the 17th section.

Plt. may give in evidence one or more written or printed papers, for the purpose of proving the contract, if they are sufficiently connected: 1 N. R. 252. The following bill of parcels, delivered by defts. to plts. is a sufficient note, &c.:—"London, 24th Oct. 1812. Messrs. Schneider & Co., bought of T. Morris & Co., agents, cotton yarn and piece goods, No. 3, Freeman's Court." And then followed a list of the articles sold, the words Messrs. J. Schneider & Co. being written by the defts.; the rest of the heading was printed. As was observed by *Bayley, J.*: "Here the terms of his contract are recognized by the deft., who is the party to be charged, by his signing the name of Schneider & Co.:" *Schneider v. Morris*, 2 M. & S. 289. Where there are two or more papers, one must be connected with, or expressly refer to, the other, as no parol evidence can be admitted to show their connexion or reference: 1 Ves. 326, 1 Sch. & Lef. 33. Thus, a minute made in the catalogue of sale at an auction cannot be coupled with the conditions of sale, so as to make it a sufficient note in writing of the agreement, unless the catalogue is annexed to, or refer to, the conditions: 7 East, 558. Therefore, in 11 East, 157, where deft. subscribed his name in the book of subscribers for the *Boydell Shakespeare*, but which had no direct written connexion or reference to the *prospectus* containing the terms, it was held not to be a sufficient note in writing. And a reference in an agreement to such parts of another paper as have been read to the party is insufficient: 1 Ves. Jun. 326. As to what is sufficient to connect two papers, when one paper refers to another, it has been held that, where the following bill of parcels, "London, bought of J. and F. B., distillers, No. 8, Oxford Street [printed thus far, and the rest written], 100 gallons of gin, 1 in 5 gin, 7 S. £350," was delivered at the time of the order given, connected with a letter written by deft. to plt. subsequently, and referring to the order, it was a sufficient note, &c.: 2 B. & P. 238. And, where deft. wrote a letter to plt., admitting a contract for delivering flour, as stated in a notice previously served by plt. on deft., and which notice contained an assertion of the contract, specifying the quantity, quality, and price of the flour, such two papers were held a sufficient note, &c. of the deft.'s contract, within the statute: *Jackson v. Lowe*, 1 Bing. 9. But a letter by deft., admitting that he had made a parol agreement, but not containing the terms, is not a sufficient note, &c.; *Prec. Ch.* 560; 1 Atk. 12; 9 Ves. 250. So, an indorsement by the deft., on the back of a draft lease, of his agreement to take the premises, is sufficient: 5 Esp. Rep. 190. And an order for goods, written and signed by the seller in a book of the buyer's, but not naming the buyers, may be connected with a letter of the seller, claiming the performance of the order, to constitute a complete contract within the statute: *Allen v. Bennet*, 3 Taunt. 175.

It is necessary, not only that the note or memorandum be in writing, but it must be founded on a good and sufficient consideration, and include a statement of such consideration: *Saunders v. Wakefield*, 4 B. & A. 601; *Wain v. Wallers*, 5 East, 10. It is not necessary that the consideration be stated in express terms, *Jenkins v. Reynolds*, 3 B. & B. 14, 3 Bing. 113; but it is sufficient if it can be inferred from the whole tenor of the writing: 9 East, 348; 1 Camp. 242, s. e.; *Holt, C.* 153; 3 B. & B.

201; 1 Saund. 211, c.; *Newbery v. Armstrong*, 4 Carr. & Payne, 59; 3 Moo. & Payne, 509. As a consideration was necessary by the common law, the statute has made no alteration, except requiring it to be made in writing; for the word "special promise," itself implies a consideration;

"but it is not necessary that there should be a consideration [\*549] directly between the \*persons giving and receiving the guaranty; it is enough, if the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is given suffer inconvenience, as an inducement to the surety to become guaranty for the principal debtor:" *p. Best, C. J., Morley v. Boothby*, 3 Bing 113. As to what is a sufficient consideration to support a promise for the debt, default, or miscarriage, "perhaps the best rule is, that any damage, or any suspension or forbearance of his right, or any possibility of a loss occasioned to the plt. by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party undertaking:" 1 Saund. 211, c. 2; 3 Burr. 1673; 3 T. R. 24; 2 H. Bl. 812. A past consideration, or a promise to pay a debt already incurred by another person, is not binding without a consideration at the time the promise is made, as forbearance, &c., an extension of credit, &c.: 1 Roll. Ab. 27, pl. 49. [See *ante*, "*Assumpsit*," "*Consideration*."] But this seems scarcely reconcilable with the cases of *Boehm v. Campbell*, 3 Moo. 15, *Pau v. Marsh*, 1 Bing 216, "in both which cases a by-gone consideration was expressed on the guarantees:" *p. Best, C. J.*, 3 Bing. 114. However, if deft. verbally request plt. to credit a person for goods, and he does it, such previous request is a sufficient consideration to support a written agreement, afterwards signed by deft.: *Lyon v. Lamb*, Fell, M. Guar. 260.

The following guarantees have been held as sufficiently describing the consideration therein:—"I guarantee the payment for any goods which T. S. delivers to J. R." is good, the future delivery of the goods being apparently the consideration: *Stadt v. Hill*, 9 East, 348; 1 Camp. 242, s. c.; *Warrington v. Turber*, 6 East, 89, s. p. So, "I hereby guarantee the present account of Miss H. M., due to R. T. S. and Co. (the plts.) of £112. 4s. 4d, and what she may contract from this date to the 30th Sept. next," has been considered sufficient: *Russell v. Mosely*, 6 Moo. 521; 3 B. & B. 211, s. c. So is a written promise: "Messrs. B. and Co., gent.:—Our mutual friends, Messrs. S. & Co., having accepted the under-written bill, drawn on them by your firm, I hereby give my guarantee for the due payment of the same, should it be dishonoured by the acceptors:" *Boehm v. Campbell*, 3 Moo. 15. So is a written promise: "I hereby hand your drafts, drawn by Mr. W. and accepted by Mr. B., and indorsed by R. B., and, should the bills not be honoured when due, I promise to see that they do so:" *Morris v. Stacey*, Holt, C. N. P. 153. So is a written promise: "Mr. P.:—Sir, M. L. having chartered your ship, Roberts, to bring a cargo from New Brunswick, and the same being landed to the charterer, and he having paid you one-half the freight, and given you his acceptance for the remaining half at four months' date, I engage to be accountable to you for the amount of said acceptance, should it not be paid when due:" *Pace v. Marsh*, 1 Bing. 216, *Newbery v. Armstrong*, 3 Moo. & Payne, 509. The following guarantee was held insufficient, from not stating a consideration:—"Mr. Wakefield will engage to pay the bill drawn by P., in favour of S. S.," 4 B. & A. 595; and, for the

same reason, the following was held insufficient: "To the amount of £100, consider me as security on J. C.'s account." (Signed and dated.) In *Morley v. Boothby*, 3 Bing. 107, the following guarantee was held insufficient: "Messrs. Morley and Co.:—We hereby promise, that your draft on W. Clarke and Co., due at Messrs. M., at six months, on 27th Nov. next, shall be then paid, out of money to be received from St. Philip's church; say amount, £174, say 27th Nov.: W. W. Clarke, W. Boothby," (and dated); "because," as said by *Best, C. J.*, "in the instrument there is neither past nor future consideration. It does not appear that the credits which had previously been given to the original debtors, were excused in consequence of those guarantees. When the bills which had been given were at maturity, the debtors could be sued as well after as before the giving the guarantee. \*The debtors [\*550] had no benefit, nor did the creditors put themselves to any inconvenience. Though the paper speaks of money for St. Philip's church, it does not appear that the persons subscribing such paper had any thing to do with the money." [See also, *James v. Williams*, 3 Nev. & M. 196; 2 Dow, P. C. 481.] So, a memorandum written by the plt.'s clerk, in the presence of the deft., that "the latter had called to say that he would be responsible for goods delivered to Mr. H.," it is not a sufficient undertaking, *Dixon v. Broomfield*, 2 Chit. Rep. 205; nor is a written memorandum, "Mr. W. will engage to pay the bill drawn by Pitman in favour of S. S.:" *Saunders v. Wakefield*, 4 B. A. 595.

Though parol evidence cannot be received, "to extend the terms of the agreement in writing," yet it is admissible to explain particular parts: 15 East, 274; *post*, "Parol Evidence." Thus, *parol Evidence* may be given of the delivery of goods to a third person, under a written guarantee to the vendor; viz. "I guarantee the payment of any goods which J. S. delivers to J. N.:" and *Ld. Ellenb.* said, "that the stipulated delivery of the goods to J. N., was a consideration appearing on the face of the writing, and, when the delivery took place, attached:" *Stadt v. Hill*, 9 East, 348. So, where the payment of a debt is guaranteed, parol evidence may be given of the amount of the sum due, and the quantity of goods delivered, or that the guarantee was addressed to witness as plt.'s attorney. Thus, the following letter:—Mr. G., Sir, the bearer, D. A., has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid." Signed by deft. Parol evidence was admitted to prove that *plt.* (whose name was not mentioned in the letter) was about to sue *Williams* for £80, and that Mr. G., to whom the letter was addressed, was plt.'s attorney: *Bateman v. Philips*, 15 East, 272; 9 *id.* 348; 1 Camp. 242, s. c. And the following guarantee was held to contain a sufficient consideration on the face of it:—"I herewith hand you your drafts, drawn by W., and accepted by B., and indorsed by R. B; and, should the bills not be honoured when due, I promise to see that they do so:" 1 Holt, C. 153; 3 Moo. 15; 3 B. & B. 211; 6 Moo. 521, s. c.; 1 Bing. 216. But a written agreement for a lease, under a certain rent, ought to specify the term for which the premises are to be demised, or to refer to some written instrument to that effect: *Clinan v. Cooke*, 1 Sch. & Lef. 22. And, for the sale of land, "it would be a very insufficient agreement to say, 'I agree to sell A. B. my lands,' without specifying the terms or the price:" *per Bayley, J.*, 4 B. & A. 601-2.

The actual *signature* of the deft. is not essential; for it has been decided (1 Esp. Rep. 190,) that if a man draw up an agreement in his own hand-writing, viz.: "I agree," &c., and leave a place for a signature at the bottom, but never sign it, it may be considered a note within the statute: see *ante*, 541-2. But it must appear, from the instrument, that the agreement was complete. So, the written instructions for a deed, unless signed, will not be received in evidence: 1 P. Wils. 771, *n.*; 2 B. & C. 569. So, a marriage-treaty, though all in the father's hand, but not signed nor reduced into proper legal form, has been held to be only a sketch of an agreement: 3 Atk. 504. Nor is it essential on what part of the agreement the signature appear, 3 Mer. 62, 1 Esp. Rep. 189, nor even if it be on the agreement itself; it may be indorsed on a draft, &c., 5 Esp. Rep. 191, 12 Ves. 466, or written in a memorandum referring to a letter, &c.: 1 P. Wms. 770. And signing the party's initials has been held sufficient; 1 Camp. 513. And, where the agreement is written by the deft., but the name printed, it will be evidence of a note, &c.; signed, &c.; 2 M. & S. 286; 5 B. & P. 239.

The agent, if any, who signed the agreement, to render it binding on deft., need not be appointed by writing, and his authority may be proved by parol: 1 Esp. Rep. 106; 9 Ves. 234, 250; 7 T. R. 207; 1 Sch. &

Lef. 22. But one of the contracting parties cannot sign as [\*551] agent for another; \*it must be a third person: 2 Camp. 203.

The clerk of an agent has not, in general, an authority to sign, 2 Chit. Rep. 206, unless his principal expressly assent: 9 Ves. 234. The agent's authority may be countermanded before he acts: 2 Camp. 339. An auctioneer is considered as acting as agent for the parties under this statute: see *post*, "*Vendor and Purchaser*." The first and second section of this statute, relating to realty, require the agent to be appointed by writing.

*Stamp.*] A written guarantee, to the amount of £20, requires an agreement-stamp, like other agreements: see *post*, "*Stamp*." A guarantee for the payment of goods to a certain amount, which a third person was about to purchase, is exempt from the stamp-duty under the exemption relating to agreements for the sale of goods: *Warrington v. Turbor*, 8 East, 242; *Watkins v. Vince*, 2 Stark. 369; *post*. And see a case of guarantee exempted from stamp-duty under the exemption relating to letters between merchants: 5 T. R. 176.

*Proof of Plaintiff's Performance of Contract, Defendant's Non-performance, and other averments.*] As the claims against a surety is *strictissimi juris*, it is incumbent on the plt. to show, that the terms of the guarantee, when any condition is annexed to them, have been strictly complied with, and as stated in the declaration: *Bacon v. Chesney*, 1 Stark. 192. If the guarantee was to pay the debt of a third person, on request, such request must be proved, 1 Cro. J. 500, Owen, 109, 1 Saund. 32, *n.* 2, 2 B. & C. 685, 6 M. & S. 121, or else plt. must show something to dispense with it; 10 East, 359, 361. Where the instrument of guarantee does not purport to be absolute and conclusive, it is incumbent on the plt. to show that he gave notice to the deft. that he accepted it as such: *ante*, 548; 1 M. & S. 557; 2 Stark. 371. A guarantee to indemnify and save harmless is broken by not saving the plt. from incurring expense,

ac., and is not sufficiently performed by reimbursing him such expense, when incurred: 8 East, 593. Where the deft. undertook to guarantee the plt. against any loss in case the deft.'s son became a bankrupt, it was held that, in order to prove the allegation that he had become bankrupt, plt. was bound to prove that a commission had been actually sued out against him: *Bulkeley v. Lord*, 2 Stark. 400. Where the guarantee imports that eighteen months' credit was to be given to the vendee, it is sufficient to show that twelve months' credit was given, provided six more have since elapsed: 1 Stark. 192. Upon a contract to guarantee a bill for a given sum, the guarantee would not be liable to that extent on a bill given for a larger sum: *Philips v. Astley*, 2 Taunt. 206. But a limited guarantee, for moneys lent to the amount of £200, is not discharged by moneys lent above that sum: *Hall v. Grose*, 3 Chit. Com. L. 323. A guarantee for the payment of goods supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee: 2 Stark. 426; and see 2 Moo. 134. A guarantee to B. does not extend to a new firm created, 3 Camp. 53, 2 B. & A. 39, 3 East, 484, 4 Taunt. 373, 2 M. & S. 363, or a new credit given after the guarantee: 3 Camp. 320. A surety of bills, drawn by J. C. and T. C., or either of them (who were, in a deed, stated to be partners) is not liable for bills drawn after the death of T. C.: 1 Bing. 452. A bond, reciting that A. had taken a house in the parish, for a certain term, and conditioned to indemnify the parish against any charges resulting from A.'s becoming an inhabitant, continues during his inhabitancy, whether in the same house or not, though beyond the term: 1 M. & S. 120. And where, from the terms of the condition, a mere continued employment seemed to have been meditated, and no specific time was limited, yet, it appearing that the office for which the security was given was an annual office, the court held the security at an end on the expiration \*of the first year: 2 N. R. 175; and see the cases in [\*552] 2 B. & A. 431, 12 East, 400, 9 Moo. 102, 2 Bing. 32, s. c., as to the continuance of a bond for the collector of taxes, rates, &c.

A guarantee for a debt due is a continuing one, unless it be otherwise expressed: 3 B. & C. 166. A guarantee "for any goods the plt. hath, or may supply W. P. with, to the amount of £100," is a standing and existing guarantee until revoked: *Mason v. Pritchard*, 12 East, 227; *ib.* 413. So a guarantee in the following words: "I do hereby agree to guaranty the payment of goods to be delivered in umbrellas and parasols to J. and E. S., according to the custom of their trading with you, in the sum of £200," constitutes a continuing guarantee; the custom of trading between the plaintiff and J. and E. S. being to make up monthly accounts of goods delivered, and for J. and E. S. to give acceptances to the amount of each monthly account: *Hargrave v. Smees*, 3 Moo. & Payne, 573. On the other hand, a guarantee "of the payment of A. B. to the extent of £60, at quarterly account, bill at two months, for goods to be purchased by him of the plt.," is not a continuing or standing guarantee to that extent of goods, to be at any time supplied to A. B., until the credit is recalled: *Melville v. Hayden*, 3 B. & A. 593. And a guarantee, "you may let A. B. have coals at £50, for which I will be answerable at any time, is not a continuing guarantee:" 2 Chit. Rep. 205. In 2 M. & S. 18, *Ld. Ellenb.* said, "This is a bond given by a surety as an indemnity for advances to a particular amount; it is the same as if the surety had expressed that the

bankers might lend to the extent of £300, and when the advance was made to that amount, the guarantee became *functus officio*, and it was not a continuing guarantee."

*Evidence for Defendant.*

The deft.'s evidence may consist in rebutting the foregoing proofs of the plt.'s, or he may show his discharge from liability on the ground that the plt. has discharged or given time to the principal debtor, without the deft.'s consent, so as to have deprived the deft. of the power of suing him; or he may show that the nature of the security has been varied: Holt, C. N. P. 84, 403; 2 B. & P. 61; 2 *ib.* 366; 5 B. & A. 191. But, to discharge the deft. at law, on the ground of time given to the principal debtor by the plt., or any other act done to the deft.'s prejudice, the agreement to give time for the act of the plt. must be such as, in point of law, will amount to an absolute estoppel to the plt.'s remedy over against the principal debtor, either absolutely or for a time; and it is no defence, therefore, to an action on a bond against a surety, that, by a parol agreement, time has been given to the principal: 5 B. & A. 187. The mere taking an additional security, not relinquishing, even for a time, the plt.'s remedy against the principal, on the original security, does not discharge deft., and a composition with the principal, reserving the remedy over against the surety, does not discharge the latter: see 18 Ves. 20; 5 Dow. 234; 3 East, 251; 2 B. & A. 210; 3 B. & C. 208; 5 D. & R. 259; 4 B. & C. 506. The taking an indemnity from another quarter does not discharge the deft.: 6 T. R. 413. As to how far proving under a commission, and signing the principal debtor's certificate, discharges deft., see 2 D. & R. 337. As to abandoning execution against him, see 2 Swanst. 190. There is no obligation on the plt. to have used active diligence to sue or enforce the liability of the original debtor; he may forbear as long as he likes: see 6 Ves. 734; 18 *ib.* 20; 4 Moo. 153. The neglect of the plt. to look with sufficient attention into the accounts of a person in his employment, for whose fidelity deft. has become security, is not such a laches as would discharge deft., 10 East, 34; and, where the plt. did not give the deft., a surety, notice of the large amount of the debt due, deft. was held not discharged: 3 Bing. 71. And, in general, the neglect of the obligee to give notice to the surety that the principal had made default, does not discharge such surety: Holt, C. N. P. 84. But, where a person guarantees the payment of goods, to be delivered to a third person, and to be paid for on the usual credit, it is the duty of the creditor, if the payments are not made regularly, to communicate that fact to the surety; and, if he neglect to do so, and goes on, giving further credit to the principal, he cannot [\*553] afterwards, on the insolvency of the latter, resort to the surety, *Berry v. Titten*, H. T. 1815; and gross delay might, in some cases, be a discharge: see 1 B. & P. 419; 10 East, 34; 4 Moo. 153.

The deft. may be discharged by operation of law, as where he becomes the partner or husband of the obligee, or party guaranteed: 2 Moo. R. 393.

An alteration made in the contract of guarantee against the deft.'s consent will discharge him, even where the alteration is beneficial, 1 East, 619, 2 H. Bl. 163, 6 T. R. 200, 5 M. & S. 223, *ante*, "*Alteration*;" but it must be a substantial alteration: *per Littledale, J.*, 5 B. & C. 269; *sed quære*. It is the duty of the party to whom the surety (deft.) is bound, to



put him in possession of all the facts likely to affect the interest of his liability; he must be made acquainted with the whole contract entered into with his principal, and, if there be a private agreement for a further payment, &c., it is a fraud on him; therefore, a private agreement between a vendor and vendee of goods, for the price whereof the debt had become liable as surety, that the vendee should pay a further sum beyond the market price, to be applied towards an old debt, discharges the debt from all liability in his guarantee: see 3 B. & C. 605; 5 D. & R. 505; Chit. Contr. 226; 3 Bing. 75. If A. agree to give B. a certain sum for goods in advancement of C., a secret agreement between B. & C., that the latter shall pay a further sum, is void, as a fraud on A., although the bill of sale is made to A., and B. cannot recover such further sum, 3 T. R. 551; and, as to fraud in agreement, for poundage to recommend customers, 4 Esp. Rep. 179, and fraud on surety in composition, 4 B. & C. 506, 512; 6 D. & R. 576, *s. c.*

A release of one surety is a release of all; but this must be where they are jointly, and not severally bound. If one of the seals of one of several joint-obligees be torn off, it releases the rest; but not so if they be severally bound: see case and law, 3 D. & R. 112.

A surety, though since discharged, may render himself again liable upon any subsequent promise: 1 Wils. C. N. P. 418; 2 Swanst. 185, 192.

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GUARDIAN.—See INFANT.

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## HANDWRITING.

**How PROVED.]** Evidence of a party's handwriting is usually given by calling witnesses who have seen him write, and are acquainted with the character of his writing. And such are not required to swear positively that the writing produced is the handwriting of the party but merely that he *believes it to be so*. And such knowledge or belief will be sufficient, though the witness has seen the party write but once: *Powell v. Ford*, 2 Stark. 164. And it has been held on a foreign bill, that it is evidence to go to a jury, that a person who saw the party write his name once, thinks the handwriting like, though he has no positive belief on the subject: *Garrel v. Alexander*, 4 Esp. Rep. 37. And it is sufficient if the witness has seen the party write as much of the name as the signature to be proved contains, Bayl. 380; or if he has seen him write his surname only, *Lewis v. Sapia*, 1 M. & M. 39; and the case of *Powell v. Ford*, 2 Stark. 164, is overruled, as to that point: *ib.* A witness who has seen the party write, but has forgotten the character of the handwriting, may refer to the signature to refresh \*his memory: *Burr.* [\*554] *v. Harper*, Holt, C. 420. But, where the witness stated that he had been an attesting witness to another instrument, to which he had seen the party subscribe his name, but was unable to form an opinion without examining such other instrument, it was held insufficient: *Filliter v. Minchin*, Mankings Index, 131.

*Knowledge from Correspondence.*] A knowledge of the party's handwriting may be derived from a fixed correspondence between the parties and by letters: as, where the witness has acted on letters sent to him from the party directing goods to be sent, for which the party has afterwards paid; or from witness having paid bills of exchange, according to the party's written directions, which have afterwards been accounted for by him, 1 Bla. 384; 1 Ph. Ev. 467; *Thorpe v. Gisburne*, 2 C. & P. 21. And where witness has directed letters to the party and received answers, R. & M. 90, he is competent to prove the handwriting, though the witness has never done any act in consequence of the receipt of such answer; *ib.* *Doe v. Wallinger*, Man. In. 131. The handwriting of a Member of Parliament may be proved by a clerk employed to inspect *franks*, though he never had occasion to apply to the party to verify his hand, 2 Ph. Ev. 714; and deft. may be identified by proving that there was no other person living at the place. A witness who had never seen the deft., but had corresponded with a person of the deft.'s name, living at Plymouth Dock, where the deft. resided, and where, according to other evidence, there was no other person of that name, stated that the handwriting of certain letters was that of the person with whom he had corresponded: it was held sufficient: *Harrington v. Fry*, R. & M. 90.

*Comparison of Hands.*] Evidence of the handwriting by comparison is not allowable, 1 Esp. D. 176; and, though a witness who has seen a person write, and yet retains no distinct impression of the handwriting, may be allowed to revive his memory by looking at the paper which he saw written, and which he has kept in his possession, yet he will not be allowed to form his opinions from any supposed knowledge which he may have acquired by comparing the characters of the respective writings: 1 Ph. Ev. 172. *Clermont v. Tullidge*, 4 Carr. & Payne, 1, and note.

A witness may prove handwriting, although he never saw the party write, if the antiquity of the writing render that impossible, by swearing that it corresponded with other ancient documents, acknowledged to be genuine: *Gould v. Jones*, B. N. P. 236. Where a person had been dead a great number of years whose handwriting was to be proved, it was done by showing the similarity of the handwriting in question to the handwriting of his will: *Morewood v. Wood*, 14 East, 328, *n.*; *s. p.* *Doe d. Brune v. Rawlins*, 7 *ib.* 282, *n.* And in these cases this evidence is admissible, if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings, bearing the same signature and preserved as authentic documents, B. N. P. 236; *Taylor v. Cooke*, 8 Price, 652; but, where there is no proof or presumption that the documents with which the instrument produced has been compared, were written by the party whose handwriting is to be proved, the evidence of the witness who compared them is inadmissible: *Randolph v. Gordon*, 5 *ib.* 312. Authentic ancient documents may be submitted to a witness at the trial for his inspection, and, after forming a judgment of their character, his belief, as to the handwriting it contains, may be inquired into: *Doe d. Tylman v. Turvey*, R. & M. 143; *Burns v. Rawlins*, 7 East, 282. And the rule that comparison of hands is not evidence, does not extend so far as to prevent the court and jury from instituting a comparison between two documents of which *prima facie* evidence has been given. *Griffith v. Williams*, 1 Crompt. & Jerv. 47.

Where the genuineness of a signature is questioned, inspectors of franks, clerks of the post-office, and other persons practised in examining handwriting and in detecting forgeries, have been in some cases allowed to give their opinion, from their general knowledge of handwriting, whether a particular \*specimen of writing is a genuine or imitated character: 1 Ph. Ev. 474; *Goodtitle d. Pevett v. Braham*, 4 T. R. 497; *R. v. Cator*, 4 Esp. Rep. 117, 145. But doubt as to the admissibility of this kind of evidence has been entertained, and it has been resisted at *nisi prius*: *Gurney v. Langlands*, 5 B. & A. 330; *Cary v. Pitt*, Pea. Ev. 85. And, to prove the handwriting of a member of Parliament, the opinion of a clerk employed to inspect franks, who never had occasion to apply to the member to verify his handwriting, has been held insufficient: *Batchelor v. Sir J. Honeywood*, 2 Esp. Rep. 714.

*Subscribing Witness, Handwriting, and Identity.*] Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any farther proof of the identity of the parties, except the identity of the name and description: *Page v. Mann*, M. & M. 79; *ante*, 425, where the law on the subject is collected.

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HEARSAY EVIDENCE.

*By parol*, 555.

*When admissible*, *ib.*

*When forming part of the Res Gesta*, *ib.*

*Dying Declarations*, 556.

*Pedigree*, *ib.*

*When admissible against Witnesses' Interest*, 557.

*By Writings*, *ib.*

*Generally*, *ib.*

*When forming part of the Transaction*, *ib.*

*Ancient Documents*, 558.

*By persons disinterested*, *ib.*

*Against Interest*, *ib.*

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BY PAROL.

*When Inadmissible.*] The general rule of evidence is, that testimony of what a witness has heard another person say is not admissible, though that person be dead or not to be found; because declarations so made are not upon oath, and no opportunity is given for cross-examination. And the same principle applies to statements in writing: 1 Ph. Ev. 212; see *post*, 557.

*When Admissible.*] There are, however, exceptions to the above rule, and evidence is admitted of what a witness (since dead or fraudulently kept away) swore at a former trial between the same parties: *Mayor of D. v. Day*, 3 Taunt. 362; 2 Show. 47; B. N. P. 245. But the very words must in such cases be repeated, and not merely their purport or effect: *Rex v. Jolliffe*, 4 T. R. 290. And what a witness has been heard to say

at another time may be given in evidence, in order to confirm or invalidate the testimony he gives in court: *Gilb. Ev.* 130. Hearsay evidence is also admissible, when it forms part of the transaction, or *res gesta*; in proof of pedigree, or in questions of legitimacy, in the case of dying declarations, in support of public rights or particular customs, in cases of prescription, and ancient documents, *infra*.

*When Admissible as Part of the Transaction.*] Where the expressions heard constitute a part of the transaction, they are admitted to show its character or the speaker's intention: as, the declarations of a trader on leaving home, to show an act of bankruptcy: *Rep. temp. Hard.* [\*556] 267; \**Marsh v. Meager*, 1 Stark. 353. In assault brought by husband and wife, her declarations on receiving the hurt are admitted, and the patient's answers are evidence to his sufferings and the state of his health: *Aveson v. Ld. Kinnaird*, 6 East, 188, 195, 198. The declarations of the wife's reasons and intentions at the time of eloping are, in crim. con. evidence against the husband, to show his connivance: *ib.* 6 East, 193; *Hoare v. Allen*, 3 Esp. Rep. 276. And, to prove the general bad character of the plt., who sues for a breach of promise of marriage, a witness may give in evidence the representations made to him by third persons: *Foulkes v. Sellway*, 3 Esp. Rep. 236.

*Dying Declarations.*] The only case in which dying declarations have been admitted in a civil action is, where a subscribing witness of a bond or will begged pardon of heaven at his death for having been concerned in forging the instrument: *Wright v. Littler*, 3 Burr. 1244. And by *Heath, J.*, cited by *Ld. Ellenb.* 6 East, 195; *Doe v. Ridgway*, 4 B. & A. 53.

*Pedigree and Legitimacy.*] In questions of legitimacy and pedigree, the declarations of disinterested persons, since dead, are admitted in the absence of positive proof: *Rex v. Inhabitants of Eriswell*, 3 T. R. 707; B. N. P. 294. Descriptions in wills, upon monuments, in bibles or other books, recitals in family deeds, or engravings upon rings, are evidence of birth or pedigree: 13 Ves. 514; *Doe v. Rawlings*, 1 Coop. Ch. R. 39; *Doe v. Pembrose*, 11 East, 505; *Higham v. Ridgway*, 10 *ib.* 120; *Goodwright v. Mass*, Cowp. 597; 13 Ves. 144; B. N. P. 233. The declarations of a deceased parent are received to prove the time of the child's birth: *Roe d. Brewe v. Rawlings*, 7 East, 290; *Hawes v. Wheeler*, T. Raym. 84; 10 East, 120: but not the place: *Rex v. Inhabitants of Eriswell*, 8 *ib.* 542. The declarations, to be admissible, must be made by some person whose connexion with the party in question affords some assurance of correct and peculiar information, 13 Ves. 714: as the declarations of deceased parents to prove a marriage, in a question of legitimacy, 6 T. R. 330, B. N. P. 112; or of a deceased husband, to prove the legitimacy of his wife, though no blood relation, *Vowels v. Young*, 13 Ves. 148; or of a deceased surgeon, respecting the time of a birth at which he attended, 10 East, 120. But the opinion of deceased neighbours, acquaintances, and servants, not connected with the family, is not admissible; 13 Ves. 147; 18 *ib.* 443, 446; *Rex v. Inhabitants of Eriswell*, 3 T. R. 723; *Weeks v. Sparke*, 1 M. & S. 689; *Pike v. Carter*, 3 Bing. 86; *Morewood v. Wood*, 14 East, 330. Nor is the hearsay of a relation to be admitted, when that relation himself can be produced: *Cortius v. Munaz*,

2 Stark. 924; B. N. P. 113; *Harrison v. Blades*, 3 Camp. 457. Nor are the declarations of a wife ever allowed to prove the non-access of the husband: *Rex v. Luffe*, 8 East, 203; Cowp. 592; B. N. P. 112; *Rex v. Inhabitants of Kea*, 11 East, 133.

When *post litem motam*, if the declarations were made after the commencement of a suit, or of a controversy preparatory to it, they are not to be received, *Berkley Peerage Case*, 4 Camp. 401, 2 S. N. P. 712, though it is not proved that the controversy was known, 4 Camp. 417; and the award of an arbitrator upon the same question between different parties, has been rejected upon this ground: *Rex v. Cotton*, 3 *ib.* 444.

Depositions in a former suit upon the same manorial custom, are in like manner inadmissible; but, where the customs are different, they may be given in evidence, as the declarations of such parties are evidence against all persons standing in the same relation: *Freeman v. Phillips*, 4 M. & S. 486; *ante*, 370. To prove rights of a public nature, *Weeks v. Sparke*, 1 *ib.* 686; *Morewood v. Wood*, 14 East, 329, manorial customs, *Denn v. Spray*, 1 T. R. 466, boundaries of parishes and manors, \**Nichols* [\*557] *v. Parker*, 14 East, 331, or a *modus*, *Weeks v. Sparke*, 1 M. & S. 691, hearsay, or common reputation, is admitted to be evidence. But such declarations must not have been made: *Rex v. Cotton*, 3 Camp. 444. And evidence must be first given of the exercise of the right to let in the evidence of reputation, which then is confined to the declarations of such old persons as were in a situation to know: *ib.*

As to the competency of witnesses in these cases, it is no objection to the admission of such evidence, to prove the boundaries of a parish, or a parochial *modus*, that the deceased was a parishioner, claiming a right of common, which his declaration might enlarge, *Nichols v. Parker*, 14 East, 331; or liable to pay tithes, which it might abridge; *Harewood v. Sims*, 1 Wightw. 112. But, generally, though general reputation is evidence, reputation or tradition of a particular fact is none: *Show v. Pincke*, 5 T. R. 125; 3 *ib.* 709; *Morewood v. Wood*, 14 East, 330, 331; *Weeks v. Sparke*, 1 M. & S. 687; 1 Price, 253; 1 Anstr. 298. But, in questions of pedigree, as reputation necessarily relates to the particular facts of marriage, birth, &c. such evidence is admitted: 4 Camp. 416. Whether hearsay evidence is ever admissible to prove a private prescriptive right, see *Morewood v. Wood*, 14 East, 327; 5 T. R. 123; *Withnell v. Gartham*, 1 Esp. Rep. 324; B. N. P. 295; 1 Ph. Ev. 278; *Davies v. Lewis*, 2 Chit. R. 535; 2 M. & S. 494; 1 East, 323.

*What Admissible against Witnesses' Interests.*] Declarations of deceased persons against their own interest are in many cases, admitted to be evidence: as, a deceased occupier's declaration that he rented the land of a particular person, is evidence of that person's seisin: *Uncle v. Watson*, 4 Taunt. 16; *Holloway v. Raikes*, 2 T. R. 55. The declarations of tenants deceased are admitted to show that a certain piece of land is parcel of the estate they occupied: 2 T. R. 53, 14 East, 332; 2 M. & S. 49; 1 *ib.* 77. 679. So, where the question was, whether horses taken by the deft. under a heriot custom belonged to the plt., or to A. B., deceased, the declarations of A. B., that they belonged to the plt., were held good evidence: *Ivat v. Finish*, 1 Taunt. 141. Upon an issue, whether A. B. died possessed of a certain property, her declarations that

she had assigned it were received: 1 Taunt. 144. Declarations by the owner of adjoining land, that his neighbour's extends so far, accompanied with acts of forbearance to go farther, or even declarations against his own interest, without such acts, are evidence of the extent of that neighbour's land: *Sir T. Stanley v. White*, 14 East, 332. It is the constant practice to receive such evidence in questions of tolls, rights of way, freehold in wastes, and the like: 1 T. R. 659; 14 East, 342; 1 Camp. 310; 5 Taunt. 752. The persons who make the declarations must be deceased at the time of trial; and, if living, and incapable of attending from illness, such declarations are admissible: 3 Camp. 457; 1 Price, 282.

### BY WRITINGS.

*Written Statements in the nature of Hearsay Evidence.*] The rules and principles of hearsay evidence apply to statements in writing no less than to words spoken. The only difference is, that there is greater facility of proof in the former case, as a written account is proved to be genuine by proof of the handwriting; but the genuineness of oral declarations must depend upon the memory and accuracy of the witnesses who profess to speak them: 1 Ph. Ev. 218.

*Where Part of the Transaction.*] Where A., the holder of a bill, deposits it with B., as security for the balance of accounts between them, and, after it is due, B. indorses it to C., in an action by C. against A., the account-book of B. is not evidence in diminution of the [\*558] balance between A. and B.: but a contemporaneous entry or declaration would have been admissible: *Coltenridge v. Farquharson*, 1 Stark. 259. A letter, inclosing a note, may be read in evidence, as a declaration, accompanying an act, to show for what purpose the note was sent: *Bruce v. Hurly*, 1 Stark. 23. Letters by the payee to the maker of a promissory note, contemporaneous with the making, and forming part of the original transaction, are admissible in evidence to prove the consideration between those parties; and this in an action by the indorsee against the maker: *Kent v. Lowen*, 1 Camp. 177; see, also, 1 Camp. 512; B. N. P. 17. The parties must themselves be called; 1 Ph. Ev. 220, *ante*. What a third person has said, or *written*, is admissible in many cases, as amounting to an act done by him, or showing his knowledge, or as evidence of his conduct. If, for instance, it is material to inquire whether a certain person gave a particular order on a certain subject, what he has said or written may be evidence of that order: *ib*. Letters from a trader, who has left the realm, are admitted to establish an act of bankruptcy, by showing his intent, such departure and absence being a continuous act: *Thomson v. Haigh*, 9 Moo. 217. In *crim. con.*, letters from the wife to the plt. are admissible, though living apart, and the cause of separation unexplained; as their expressions are admitted, when together, to show the terms on which they live: *Trelawney v. Coleman*, 1 B. & A. 90. So, letters from a foreign agent, to prove the assent of a merchant here to a deed of inspection: *Rez v. Hunter*, 4 Price, 258.

*Ancient Documents.*] Old leases and rent-rolls have, in certain cases,

been received in evidence, in favour of the party claiming under the lessors: 1 Camp. 309. But they must come from the custody of some one connected with the estate to which they relate: *Summerton v. Stafford*, (Mery) 3 Taunt. 91. On a question whether certain lands, approved from a waste, were subject to a right of common, counterparts of all leases, kept among the muniments of the lord of the manor, by which he appeared to have demised the land free from any such charge, were allowed to be evidence for the plt., who claimed under the lord of the manor, against the deft., who justified for common of pasture, to prove that, at the time of their respective dates, the lord had granted the land free from common, though possession under the leases was not shown, the leases being so old, that no person could speak to the possession: *Clarkson v. Woodham*, 5 T. R. 412, *ante*. An old receipt from a former renter, of a payment in lieu of tithes, in the hands of a deft., whom it was presumed to have descended from an ancestor of the same name, is evidence to support a *modus*: *Bulia v. Beaumont*, 6 Price, 307. The question was, whether the plts. were entitled to a prescriptive right of exclusive fishery, claimed on a navigable river, under the lord of the manor; and old entries of licenses in the court-rolls, stating that the lords had the several fisheries, and had granted the liberty of fishing for certain rents, were held admissible, without proof of payment under the licenses, their date being so old that such proof could not reasonably be expected. But such evidence is not entitled to any weight, unless payment under similar licenses could be proved in later times, or that the lords had exercised other acts of ownership, which had been acquiesced in: *Rogers v. Allen*, 1 Camp. 309.

*By Persons Disinterested.*] A survey of a manor by a former owner is not evidence for a succeeding owner, against a stranger, to prove certain lands parcel of the manor, 2 Ves. 43, 2 B. & A. 186; but an old survey, delivered by the owner to a purchaser of part, would be evidence against the former owner, and against a purchaser of the other part: *Bridgman v. Jennings*, 1 Ld. Raym. 734; 2 T. R. 53; 4 Gwill. 1585. But the entry by a deceased person in his book of the receipt of rent for particular lands, is "not evidence for a party claiming [\*559] under the deceased, to show that the lands belonging to his ancestor, the entry not being against interest, nor goods as tradition, because of a particular fact: *Outram v. Morewood*, 5 T. R. 123. In replevin, letters from a third party are inadmissible to affect the plt.'s title: *Halford v. Dillon*, 4 Moo. 381. The general rule is, that what a man writes for himself cannot be evidence for himself, or for his representative, claiming in his right and place: *Glyn v. Bank of England*, 2 Ves. 41; but the entries of a deceased incumbent respecting his tithes are an excepted case: 7 East, 290; 5 T. R. 128; 4 Price 171, 190, 218. The cases, in this respect have even gone so far as to admit entries made by deceased impropriators to be evidence for their successors, Bunb. 46, 180; and, in a question between the impropriate rector and vicar, respecting agistment-tithes, the books of a deceased lessee of the rectory, stating the receipt of such tithes, have been held evidence for the impropriator, after the determination of the lease, *Illingworth v. Leigh*, 4 Gwill. 1618; and on the other hand, entries by the steward of a former deceased owner of the estate, containing an account of payments to the vicar, in lieu of tithes of particular lands, have been admitted as evidence for a succeeding owner,

against the impropiator: *Woodnorth v. Ld. Cobham*, 2 Gwill. 653. It is essential in such cases, that the rector be dead, or that the entry be of so old a date, that the death may be presumed. After sixty-four years, *Jones v. Wallace*, 3 Gwill, 847, this presumption has been held reasonable; within fifty, *Manby v. Curtis*, 1 Price, 225, it has been denied. See observations on the reception of this evidence, 1 Ph. Ev. 247, and the cases there cited.

*Writings against Interest.*] Entries in the books of persons deceased, against their own interests, as, of the receipt of money on account of another, *Bam v. Babbington*, 4 T. R. 515, *ib.*, 669, or of money due to themselves, 2 Str. 1129, 2 Burr. 1072, 10 East, 118, 2 Price, 413, 437, *Doe v. Robson*, 15 East, 33, are admissible in evidence to prove the fact in consideration of which the money is said to have been received. So, entries by a deceased steward, of money received by him from different persons, in satisfaction of trespasses committed on the waste, are evidence to show the right of soil in the waste was in his master, under whom the plt. claimed, 4 T. R. 514; and, after thirty years, such entries being in the proper custody, the handwriting of the steward need not be proved: *Wynne v. Tyrwhite*, 4 B. & A. 376. So are the rentals of a deceased bailiff, to show of what tenure or right the money was received: *Harpen v. Brooke*, 3 Woodeson, 332. A bill of lading, signed by a deceased master, is evidence of property in the consignee, even in trover against a third person: *Haddom v. Parry*, 3 Taunt. 305. A memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger, in which a charge for his attendance was marked as paid, has been received to prove the child's age, it appearing by other evidence that the work was done: *Higham v. Ridgway*, 10 East, 109; *Bullen v. Mitchell*, 2 Price, 413. A receipt for damages in action was allowed as evidence of its event, the issue being collateral, and the judgment undisputed: Lofft, 303. An estate was limited to A. for life, remainder to B. for life, remainder to C. for life, remainder to C.'s son in tail, with power for the tenants for life to grant leases, reserving their ancient rent; a letter addressed, to B., deceased, by one likewise deceased, and particularly acquainted with the estate, purporting to be an account of the ancient rents at that time, and recognized as such by B., and preserved by the successive owners of the estate, was held to be evidence of the ancient reserved rent against C., and against the deft. claiming under him: *Roe v. Rawlings*, 7 East, 279, 280. A memorandum signed by a person deceased, who held a copyhold tenement, and also occupied a garden adjoining, stating that no part [\*560] of the garden belonged to the copyhold,\* but that he paid rent for the whole, is evidence for the plt. in ejectment for the garden, to prove it no part of the copyhold: *Doe v. Jones*, 1 Camp. 367.

A memorandum, signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, is evidence of reputation, even against other copyholders not claiming under those who signed it: *Chapman v. Cowlan*, 13 East, 10. Entries made by a deceased collector of rates, charging himself with the receipt of money, in the public books of his office, are admissible against his surety to prove the receipt: *Goss v. Wellington*, 3 B. & P. 132. So, entries in the books of the land-tax collector, stating



A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that he was the occupier of the premises at that time: *Doe v. Cartwright*, 1 R. & M. 62. Upon the same principle, entries in a tradesman's book by a deceased shopman, who thereby charges himself, are admitted as proof of the delivery of goods, or of other matters there stated, within his own knowledge: *Price v. Ld. Torrington*, 1 Salk. 285; see, also, 2 Ld. Raym. 873; 2 Salk. 690; *Calvert v. Archb. of Cant.* 2 Esp. Rep. 645. The entry of a copy of a license in a merchant's letter-book, by a deceased clerk, and proved to be in the usual course of business, has been admitted: *Hagedorn v. Price*, 3 Camp. 319. In a question, whether certain goods bought by the deft. were not bought in trust for the bankrupt, the assignees, having first shown that there was no entry in the deft.'s books relating to the transaction, produced several receipts in the bankrupt's possession for the payment of part of the goods, on the back of which receipts were written, by the bankrupt's bookkeeper, deceased, a reference to a certain shop-book; the entry in this shop-book was admitted, to prove, not only the payment of that part, but for the whole of the goods: B. N. P. 282. A book kept in club-room of the plt.'s tavern, in which his servants made entries of orders, and which the deft., a member of the club, might have inspected, was admitted evidence of the delivery, upon proof of the servant's handwriting, without accounting for their absence, as tantamount to a bill delivered and admitted: *Wiltzjee v. Adamson*, MS., cited 1 Ph. Ev. 252. The entries of a shopman, however, seem liable to some suspicion, as, at the time that they charge themselves with the receipt of an article, they acquit themselves of it by stating a delivery, unlike receivers, who acknowledge a payment against their own interest: see 1 Ph. Ev. 250. If the entry has not the effect to impose some charge on the servant, it is admissible; as, in an action for the hire of horses, an entry by the plt.'s servant, since dead, stating the terms of the agreement, has been rejected: *Calvert v. Archb. of Cant.* 2 Esp. Rep. 646. And, to prove the delivery of wine, the plt. produced a book of his cooper, deceased, whose name was subscribed to several articles, but it was denied to be evidence: *Clark v. Bedford*, B. N. P. 382. It must, in these cases, appear that the shopman is dead; proof that he is abroad, and not likely to return, is insufficient; and, if the clerk who made the entry be living, he only can prove it: *Cooper v. Marsden*, 1 Esp. Rep. 1. But an entry made in the shop-book by another, which witness saw soon after made, and it corresponded with the delivery which witness also saw, was held tantamount to an entry made by witness himself: *Digby v. Stedman*, 1 Esp. Rep. 328. When the clerk who made the entry is dead, proof of his handwriting will not make such entry evidence: *Lile v. Marshall*, 2 Esp. Rep. 705; *Calvert v. Archb. of Cantb.*, 2 Esp. Rep. 646. An entry by a tradesman, stating a debt to be due by himself to another, is good evidence of the debt, as made against his own interest; and, therefore, entries by a bankrupt, and an account signed by him, proved by extrinsic evidence to have been done before the act of bankruptcy, are evidence of the petitioning creditor's debt, in an action by the assignees: *Watts v. Thorpe*, 1 Camp. 860; *Hoare v. Coryton*, 4 Taunt. 560.

[\*561]

## HEIR—I. ACTIONS BY.\*

FORM OF REMEDY AND PLEADINGS, 561.

PRECEDENTS, 562.

EVIDENCE, *ib.*

**FORM OF REMEDY.]** There is nothing peculiar to distinguish the form of remedy by an heir from the form of remedy by another party.

With respect to when the heir may sue on a contract, on a covenant relating to the realty, as, for good title, the action should be brought in the name of the heir, 2 Lev. 20; and, in the case of a covenant or contract relating to and running with an estate in land, of which the covenantee was seized in fee, the heir, though not named in the covenant with the lessor, should sue for a breach of the covenant after the death of the lessor, or which, though committed before, still continues to his prejudice: 2 Lev. 92; 4 M. & S. 53, 188; 5 Taunt. 107: see further, 1 Chit. Pl. 13.

With respect to actions *ex delicto*, the heir cannot sue, unless the tort was committed after the death of the ancestor; and therefore an heir cannot maintain an action for waste committed in the time of his ancestor; 2 Saund. 252, *a. n.* 7. An heir, who is entitled to an estate *pour autre vie*, as special occupant, may recover in detinue the title-deeds relating to the estate: 4 T. R. 229, 231. In the case of land and other real property, where there is no constructive possession, an heir cannot maintain trespass before entry: Plow. 142. As to ejectment by, see *ante*, 457.

**FORM OF PLEADINGS.]** When an heir sues as such for a breach of covenant, the plt.'s derivative title should be stated, and the averment of it should precede the statement of the breach. Thus, when an action is brought by the heir of the lessor, the death of his ancestor, and the descent to the plt. as heir, is shown: 2 Chit. Pl. 571; see cases there cited. In an action on a lease by an heir, as such, the title of the lessor to the demised premises must be shown, in order that it may appear that he had such an estate in the reversion as might be legally vested in the plt. as heir, 1 Saund. 293, *n.* 2; and this even where the estate of the plt. is derived from the king or a corporation, *ib.*, 187, *n.* 1; and such inducement is traversable, 4 Moo. 303. Such title is usually shown by way of inducement, preceding the statement of the lease; as, by alleging that the lessor was seized of the premises in his demesne as of fee, 2 Saund. 361, 416; or, when the estate demised is copyhold, by showing that fact, and that the lessor was seized at the will of the lord, according to the custom of the manor: 7 T. R. 538. As to pleading a title by descent in general, see 2 Bl. Com. 200, 240; Com. D. *Pleader*, 2 E. 1, 2; 2 Saund. 418. As to pleading a descent in tail, 1 Saund. 255; the like, as co-heirs, *ib.*, *ibid.*; in a copyhold estate, 4 Co. 22, *b.*, *Vin. Ab. Copyhold, U. b.* As to pleading a descent to the king, see 4 Mod. 355. It may be pleaded that B. is heir to A., without saying either that A. is dead, or had no son: 2 Saund. 305, *a. n.* 13; 2 Lutw. 1172. It must be shown *how* the plt. is heir, whether as son or daughter, grandson, cousin. &c., 2 Saund. 45, *a.*, 5 East, 272, 1 Salk. 355; and that he was heir to the person last seized, Co. Lit.

11 &; Vin. Ab. *Heir*, L. pl. 14, 15. In pleading title as heir to an uncle, he must show how, and make the father a medium; viz. that the inheritance descended to him *ut consanguineo et hæredi*; viz. son of such a one, who is brother and heir to the uncle: 12 Mod. 619. And so, in case of a descent from the grandfather, viz. as "son and [\*562] heir to the father, who was son and heir to the grandfather: *ib*. But between two brothers, a descent is *immediate*, and title may, therefore, be made by one brother, or his representatives, *to or through* another brother, without mentioning their common father; and the son of one brother, may claim as cousin and heir to the son of the other brother, without naming the grandfather. Thus "as son of Francis, who was the brother of John, who was the father of Matthew;" 2 Bl. Com. 226; Vin. Ab. *Heir*, L. 1, pl. 18, &c.; 5 East, 272. As to pleading a descent to nieces, see 3 B. & P. 453.

### Precedents.

#### STATEMENT THAT ANCESTOR WAS SEIZED IN FEE-SIMPLE OF PREMISES.

For that whereas one G. H., before and at the time of the making of the indenture hereinafter mentioned, was seized in his demesne as of fee (*or, if the seisin be of incorporeal hereditaments only, omit the words, "in his demesne as of fee,"*) of and in the tenements, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. And, being so seized heretofore, to wit, on, &c., at, &c., by a certain indenture then and there made between the said G. H., of the one part, and the said deft. of the other part, one part, &c. (*If the action be on a lease, here set out the proferit, and all necessary parts of the lease, as post, "Lease;" and then proceed thus:*) And the said deft., being so possessed, as aforesaid, and the said E. F. being so seized of the said reversion, as aforesaid, he, the said E. F., afterwards, to wit, on, &c., at, &c., aforesaid, died so seized of the said reversion of and in the said demised tenements, with the appurtenances, as aforesaid. Whereupon and whereby the said reversion of and in the said tenements, with the appurtenances, then and there descended and came to the said plt., as son and heir of the said E. F., deceased, and thereby he, the said plt., then and there became and was, and still is, seized of the same reversion of and in the said tenements, with the appurtenances, in his demesne as of fee.

### Evidence.

As to proof of the plt. being heir, see *ante*, 457. The evidence of the cause of action, &c., will be the same as in other cases.

## II. ACTIONS AGAINST.

**FORM OF REMEDY.]** This will be the same as in actions against other parties.

With respect to the liability of an heir to be sued on a contract, where the contract is under seal or of record, the heir of the party contracting is liable to an action for the breach of it, when expressly named in the contract, and has *legal* assets by descent from the obligor: Bac. Ab. *Heir*, F. 2 Saund. 136; Com. D. *Pleader*, 2 E. 2; 7 East, 128. The heir, though not expressly named, is liable to an action for a breach of covenant running with the land, and committed in his own time: *ib*. If there be a devise (otherwise than for the payment of debts, or in pursuance of a marriage-contract, entered into before marriage,) he may be sued in an

action of debt for the breach of a contract of the testator under seal, or of record; but the heir must be joined in the action: 1 Chit. Pl. 42. If there be several heirs, as in the case of gavelkind or of parceners, they should all be joined, or the deft. may plead in abatement, and the devisee may be sued with the heir jointly, at law as well as in equity: 2 Saund. 7, n. 4. An heir and executor cannot be joined, but he may be sued at the same time; and, if the heir be also executor, separate actions may be brought against him in both capacities: Com. D. *Pleader*, 2 E.

[\*563] 3. As to suing the devisee \*where no heir can be discovered, see 8 East, 128, 133. Assumpsit lies against an heir in respect of a new consideration, where there has been a new contract to pay a debt, or perform a contract under seal, as on a promise by an heir, having assets by descent, to pay the debt of his ancestor for the same consideration: 1 Leon, 293; 2 Saund. 137, b.

There is no remedy at law against an heir for a tort committed by his ancestor: see 1 Chit. Pl. 77.

FORM OF PLEADINGS.—*Declaration.*] The venue in an action against an heir, as such, when expressly named in the specialty or contract, appears to be transitory: Hob. 37; Vin. Ab. *Heir*, R. 2. The deft. must be described as heir; and, in the old precedents, he is so described in the body of the declaration as well as in the commencement: Rast. Ent. 172. In general, it need not be stated how he became heir, whether as son, grandson, &c., that matter not lying peculiarly in the plt.'s knowledge, 2 Saund. 7, n. 4; but, where the lands have descended from the obligor to another, who has died seized, and from him to the deft., the descent must be stated specially; as, that the deft. is the heir of A. (who died last seized,) who was the heir of the obligor; and so it must be where there have been several intermediate descents; for, if the declaration be against the deft. as heir of the obligor, and it appear in evidence on the plea of *riens per descent* from the obligor, that the deft. is heir of the heir of the obligor, it is a fatal variance. Thus, where the declaration was against the deft., as brother and heir of the obligor, and it being found, on the issue of *riens per descent* from him, that he died seized in fee, leaving a son, who entered and died seized without issue, leaving the deft., his uncle, the obligor's brother, his heir at law, the court gave judgment for the deft.; for he had nothing as immediate heir to his brother by his nephew: Cro. Car. 151, *Jenk's case*; see Lil. Ent. 147. So, where, in debt against the deft. as heir of B., it appeared in evidence, on the issue of *riens per descent* from B., that he died in fee, leaving the deft., his daughter, and his wife, with child, of a son, who was afterwards born and lived an hour after his birth, it was held that this evidence did not support the issue; for the deft. had nothing from his father, the obligor, but the lands came to her by descent, as heir of her brother, who was last seized: 2 Rol. Ab. 709, pl. 62, cited *Kellow v. Rowden*, 3 Mod. 256. The declaration should be in the *debet* and *detinet*, Com. D. *Pleader*, 2 E. 2; but the omission of the *debet* will be aided by verdict: *ib.* It need not be averred in a declaration against an heir, on the bond of his ancestor, that the deft. had assets by descent, Dy. 344, b.; but it must be shown he was expressly bound: Com. D. *Pleader*, 2 E. 2; 2 Saund. 134, n. It does not seem to be necessary to state the date or substance of the will, or that the obligor died seized: 2 Chit. Pl. 469.

**Plea.]** In an action against an heir, the deft. may not only plead any matter which might have been pleaded by the ancestor or devisor, but may also either deny the character in which he is sued, or, admitting it, he may plead that he has nothing by descent or by devise, either generally or specially, Com. D. *Pleader*, 2 E. 3; viz: that he has nothing but a reversion after an estate for life or years, *ib.*, or that he has paid debts of an equal or superior degree to the amount of the assets descended or devised, or that he retains the assets to satisfy his own debts of equal or superior degree, or debts of a superior degree due to third persons: *ib.* The heir, if an infant, may also pray that the parol may demur till he is of full age: *ib.* 1 Chit. Pl. 431. Deft. cannot plead assets in the hands of the executors; for it is at the election of the obligee to sue either the heir or the executors; 10 H. 7, 8, b.; 1 And. 7. The heir must plead *riens per descent* when he has no assets, or he will be personally liable to the amount of the debt: 3 T. R. 685. As to plea of retainer by, see 1 T. R. 454. A plea by \*deft. that he claims to retain [\*564] a certain sum for money paid for repairs (not stating them to be necessary repairs) cannot be supported: *Shetelworth v. Neville*, 1 T. R. 454. As to plea of *riens per descent præter* a term for life or years, see 2 Saund. 7, n. 4. Though the devisee must be sued jointly with the heir, he should plead separately: *ante*, 562. As to pleas in general by heir; see 2 Saund. 7, n. 4; Com. D. *Pleader*, 2 E. 3.

**Replication.]** In debt against an heir, on the bond of his ancestor, to a plea of parol demurrer, the plt. may deny or confess the plea; and, to a plea of *riens per descent*, the plt. may reply either that the deft. had such assets at the time of the commencement of the suit, or that he had them between that time and the death of his ancestor, Com. D. *Pleader*, 2 E. 4, 3 & 4 W. & M. c. 14; or, if *riens præter* a reversion be pleaded, the plt. may take judgment, &c., *cum acciderint*, Com. D. *Pleader*, E. 4, 5. In an action in K. B., if the deft. had not assets at the time of exhibiting the bill, but had them when the writ issued, the issuing of the writ should be replied specially: see *ante*, 507.

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#### Precedents.

See forms of declarations against, in general, 7 Went. *Index*; against an heir on the bond of his ancestor, 2 Chit. Pl. 466; against an heir and devisee of obligor, *ib.* 469, 5 Went. 374; see form of plea of parol demurrer by an infant heir, 3 Chit. Pl. 973; *riens per descent*; *ib.*; see form of replication to parol demurrer, confessing the plea, *ib.* 1174; to *riens per descent*, that deft. had assets, *ib.*

**EVIDENCE.]** Where plt. proceeds against an heir on a bond on which he is liable, in addition to proof of the bond, in which deft.'s liability must appear as a party therein named, the plt. may be obliged to prove the deft. to be heir: which proof is made out by calling a witness who knew the obligor and his family, and that the deft. is heir at law; or he may also effect it by proving that deft. was in possession of the fee-simple land of the obligor, who is dead, and general reputation of his being heir at law: see *ante*, 457.

Where the deft. pleads *riens per descent*, though he thereby admits the obligation, yet it is incumbent on the plt. to prove assets, as that is the

substance of the issue: B. N. P. 175; 6 Rep. 47, *a*. Proof of assets in the county of A. will support an allegation of assets in the county of B.; for assets, or not, is the substance of the issue, and the place is named only for conformity: *ib*. The deft. cannot avail himself of an alienation *pending* the suit to support his plea of *riens per descent*, and the lands so aliened will still remain charged, 1 Inst. 202, *a. b.*; and if, upon this issue, the plt. prove that lands came to the deft. by descent; and the deft. give in evidence a conveyance of the same lands by himself to a stranger, before action brought, the plt. may, to encounter this evidence, prove that the conveyance was fraudulent, and therefore void by statute: 13 El. c. 5; 5 Rep. 60, *a.*; *ante*, 528. Upon the issue of *riens per descent*, the heir may give in evidence a bond, acknowledged by his ancestor, to the king, and an extent thereon to the amount of the assets descended: but the extent only, without the production of the bond, or examined copy thereof, is insufficient: 1 Ld. Raym. 734. A question frequently arises on this issue, whether the deft. takes by purchase or descent; with respect to which the general rule is, that, though the ancestor devise the estate to his heir, yet, if he take the same estate in quality and quantity that the law would have given him, the devise is a nullity, and the heir is seized by descent, and the estate assets in his hands: 2 Saund. 8, *d. n.*; [\*565] *Reading v. Royston*, 1 \*Salk. 242. And the charging the estate with debts and legacies makes no difference, if the tenure and quality of the estate be not altered: *Allam v. Heber*, Str. 1270; B. N. P. 175; see S. N. P. 524. A reversion is legal assets, but an equity of redemption is not: Com. D. *Pleader*, 2 El. 2, *ib. Assets*, R. B. Barnes, 164, 3 B. & P. 643; and, in the latter case, in the case of a bond, the obligee should proceed in equity: 2 Saund. 7, *n. 4*. As to what are assets generally, see *ib*.

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#### HIGHWAY.—See WAY.

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#### HIRE OF CHATTELS.

WHERE the goods have been lent to another, to be kept or hired, the bailee, or person to whom they have been delivered, is only liable where such neglect is imputable to him as occasions the loss, and is not bound to use more than an ordinary degree of care, and is not therefore liable for loss by fire, &c., *Jones on Bail*, 86, *Cooper v. Burton*, 3 Camp. 4, 5, *notis*; and, to enable the plt. to recover, he must prove that there was gross neglect, or that the thing lent was used in a different manner from the purpose for which it was originally hired. And it has been held, that the hirer of a chaise and horses to go a journey, is not liable for an injury occasioned by the negligence or misconduct of the postboy, 5 Esp. Rep. 35; but, where one lends a horse to go one journey, and the party to whom he has been lent takes him another, and the horse is lost or dies, the party is liable to whom he was lent: Com. Rep. 136. Where a horse is let to a person for a journey, and receives an injury, the hirer is not liable, unless the owner can prove positive negligence: *Cooper v. Burton*, 3 Camp. 5, *notis*; but, if the horse become ill, and the hirer, instead

of employing a farrier, administer improper medicines to him, and he die, the hirer would be liable for the loss of him, for that was negligence and misconduct: *Dean v. Theale*, *ib.* 4. But plt. must give the facts in evidence, as, in the first place, he must prove that the horse was overridden, not kept shod, or the like; and, in the second, prove that the medicines were given to the horse, and that the hirer administered them himself, and that they were improper: 1 Esp. Rep. 50. Where a person takes ready-furnished lodgings, and his guests or servants, while they are under the authority given by him, damage furniture, by the omission of ordinary care, he will be liable, as in other cases, 4 T. R. 319. Where immoveable property, as an orchard, a garden, or a farm, is let by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving the trees, plants, or implements, that every prudent person would use, if the orchard, garden, or farm were his own: *Powley v. Walker*, 5 T. R. 373; *Legh v. Hewitt*, 4 East, 154. The word "hired," of itself, implies a contract, and would cure an omission of the contract's being stated to have been at deft.'s instance and request: see 6 Taunt. 389; 2 T. R. 30. As to the common count for use and hire, see *ib.*; 1 Com. R. 116. In an action for the use and hire of property, the contract of hire should be proved by a party present at its making, or during any admission of deft. If any price was agreed on, the same should be proved; if not, the value, or ordinary charge of the hire, should be proved.

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*Precedents."*

[\*566]

## INDEBITATUS COUNT FOR THE USE AND HIRE OF CHATELS.

(*The commencement is as ante*, 139.) For the use and hire of divers carriages, chaises, gigs, horses, mares, and geldings, bridles, saddles, harness (or, "of certain lighters and other vessels," or, "of certain linen, china, household furniture," according to the fact,) goods and chattels, by the said plt., before that time, let to hire, and delivered to the said deft., and at his special instance, &c., and by the said deft., under and by virtue of that letting to hire, before then had and used; and, being so indebted (*conclusion as ante*, 139. *The commencement of the quantum meruit is as ante*, 139.) Had, before that time, let to hire and delivered to him, the said deft., divers carriages, &c. *as in first count*; and that the said deft., under and by virtue of the said last-mentioned letting to hire, before then had and used the same, he, the said deft., undertook, &c. (*Conclusion as ante*, 139.)

See precedent against the hirer of a horse for immoderate riding, &c., 2 Chit. Pl. 337; against the hirer of household furniture, *ib.*, 339; against bailee, having care of goods lent to him, *ib.*, 335. See *post*, "Work and Labour."

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HORSES.

As to the sale of, see "*Goods Sold*." As to the warranty of, see *post*, "*Warranty*." As to the liability of hirer of, *ante*, 565. As to horse-racing, and the statutes relative thereto, see Chit. Cont. 240, 243, 4.

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*Precedents.*

## INDEBITATUS COUNT FOR HORSE-MEAT AND STABLING.

(*The commencement is as ante*, 139, inserting these words:) For horse-meat, food, stabling, care, and attendance, by the said plt., before that time, found, provided, and bestowed, for, in, and about, the feeding and keeping of divers horses, mares, and geld-

ings, of and for the said debt., and at his special instance, &c.; and being so indebted, &c. (*Conclusion as ante*, 139. *The quantum meruit thereon is as ante*, 139, *inserting as follows* :) Had, before that time, found, provided, and bestowed, other horse-meat, food, stabling, care, and attendance, for in, and about, the feeding and keeping of divers other horses, mares, and geldings, of and for the said debt., he the said debt., undertook, &c. (*Conclusion as ante*, 139, See "*Debt.*")

#### THE LIKE FOR THE AGISTMENT OF HORSES AND CATTLE, &c.

(*The commencement is as ante*, 139.) For the agisting, depasturing, and feeding, of divers horses, mares, geldings, cows, oxen, sheep, and cattle, by the said plt. before that time agisted, depastured, and fed, in certain pastures of him, the said plt. for the said debt., and, at his special instance, &c.; and, being so indebted, &c. (*Conclude as ante*, 139. *The quantum meruit is as ante*, 139, *proceeding thus* :) Had before that time agisted, depastured, and fed, divers other horses, &c. in certain other pastures of him, the said plt., for the said debt., he, the said debt., undertook, &c. (*Conclusion is as ante*, 139.)

[\*567]

### HUSBAND AND WIFE.\*

#### I. ACTIONS BY.

FORM OF REMEDY, AND WHEN THEY MAY SUE, 567.

FORM OF PLEADINGS, 569.

PRECEDENTS, 570.

EVIDENCE, 571.

FORM OF REMEDY, *and when they may sue.*] There is nothing peculiar relating to the form of remedy for injuries to a husband and wife.

Whenever the action will survive to the wife, she must be joined with the husband, *Dunstan v. Burwell*, 1 Wils. 224; and, in general, where the wife is the meritorious cause of action, and there is an express contract with her, she may be joined with the husband, but not otherwise: *Rose v. Bowler*, 1 H. Bl. 108; *Abbot v. Blofield*, Cro. J. 644; *Rumsey v. George*, 1 M. & S. 180. She may be joined in the case of a note or bond given to her: 2 M. & S. 393. In all real actions for the lands of the wife, the husband and wife must join: 1 Bulst. 21; Owen, 83; Com. D. *Baron and Feme*, 5. So, in personal actions for a chose in action due to the wife before coverture, 1 Rol. 347, *l.* 53, Owen, 82, Cro. El. 537; as debt for rent due before coverture, upon a lease for years, *ib.* 700, or upon a lease for life, 1 Rol. 348, *l.* 8, or upon a lease at will, Co. Lit. 55, *b.*, they must join. So, in assumpsit, upon a promise to the wife before coverture, 1 Sid. 25, or for the labour of the wife, *dum sola*, they must join. Also, in an avowry for rent due before coverture, upon a lease for life or years, they must join: 1 Rol. 348, *l.* 8, 347, *l.* 50. In respect of a contract made to the wife, whilst sole, if the party thereto, after the marriage, give a bond to the husband and wife, or, in respect of some new consideration, as forbearance, &c., make a parol promise to the husband and wife, they may join, or the husband may sue alone on such new contract, 1 Chit. Pl. 19, 1 M. & S. 180, 4 T. R. 616; and, if such bond or promise were made to the husband alone, he alone should sue thereon, *ib.*; or he should join with the wife on the original contract, in cases where it is not merged by a higher security: *ib.* All *chattels* personal of the wife, in *possession*, are, by marriage, absolutely given to the husband; and, for the recovery of them, he may sue alone: 3 T. R.



631; Co. Lit. 351, b. The wife cannot be joined in an action upon any contract made with her during coverture, 2 W. Bl. R. 1239, Cro. J., 644, 2 W. Bl. R. 1237, R. & M. 102; unless in some cases, where she can be considered as the meritorious cause of action, as in the case of a bond, or other contract under seal, or note made to her, 1 Str. 230, 4 T. R. 616, 1 Wils. 224, 2 M. & S. 393; or, in the case of her personal labour, and on an express promise made to her: 2 M. & S. 393, 396; 4 T. R. 616; Cro. El. 61. For rent, or cause of action accruing during the marriage, on a lease or demise, or other contract relating to the land, or other real property of the wife, whether such contract were made before or during coverture, the husband and wife may join, or he may sue alone: 4 T. R. 617; Str. 230; 1 Wils. 224; Bro. Ab. Bar. & F. Pl. 25; Com. D. B. & F. X. Y. Where a *feme covert* sues as executor or administrator, the husband must be joined with her in such action: Com. D. Bar. & Feme, V. The wife can in no case sue alone, unless she be divorced *a vinculo matrimonii*, 3 B. & C. 291; or the husband be *civiliter mortuus*: [\*568] 4 T. R. 361; Co. Lit. 132; 2 B. & P. 105; 4 Esp Rep. 27; 9 East, 472; 11 ib. 301. [See further as to the joinder of husband and wife, *Nurse v. Wills*, 1 Nev. & M. 765; 4 B. & Adol. 739. *Clarence v. Marshall*, 4 Tyr. 147. *Glasspool v. Young*, 4 M. & R. 533. *Langfor v. Scott*, 2 M. & Scott, 349.]

On the death of the husband, the wife is entitled to sue for all chattels real, and choses in action, which her husband had in her right, and which he did not reduce into possession in his lifetime: see 1 Roll. Ab. 350; Co. Lit. 351. Com. D. B. & F. F. 1.; 2 W. Bl. R. 1239; 2 P. Wms. 496; 2 M. & S. 396-7. She is also entitled to sue on all rights of action in *autre droit*, as executrix, &c.: 4 T. R. 616; Cro. El. 114.

In actions *ex delicto*, for injuries to the wife or her property before marriage, when the cause of action would survive to the wife, Cro. Car. 419, as in trover, upon a conversion of the goods of the wife before marriage, they must join: Com. D. B. & F. V.; 10 Mod. 25. So, in trespass, for an injury done to the property of the wife, *dum sola*, they must join: 3 T. R. 627. But, in trover, where the goods were lost before marriage, and the conversion was after, the husband and wife may join, 1 Sid. 172, 1 Vent. 261, 2 Lev. 107; or the husband may sue alone: *per Hale*, 1 Vent. 261, 2 Lev. 107; 1 Sid. 172. So, in rescous of distress for a rent charge due before coverture, the husband alone may sue, for it is a wrong to him, or the husband and wife may join: Cro. El. 459; Moo. 422. Where the cause of action arises during coverture, it is very clear, that for injuries to the husband or his property, they cannot in general join in the action, 3 Bl. C. 143, 2 Ld. Raym. 1208, Rep. T. Hard. 119, 2 Saund. 47; but for any injury to the person of the wife during coverture, an action may be brought by both, for her personal suffering or injury, and she cannot sue alone, 11 East, 301, 9 East, 471, 1 Sid. 346, 386, 2 Ld. Raym. 1208; but when she joins in the action, no injury peculiar to the husband can be joined, as for expenses *in cure*, &c., or for her loss of society, &c.: 1 Salk. 119; Cro. J. 501, 538; 1 Sid. 346. In real actions for the recovery of the wife's land, and in a writ of waste thereto, both must be joined: Com. D. B. & F. V.; 1 Bulst. 21. But when the action is merely for the recovery of damages to the land, or other real property of the wife, during coverture, the husband may sue

alone, or both may sue; as, in trespass for cutting down trees belonging to the wife during coverture, the husband and wife may join, 1 Rol. 348, *l.* 18; or the husband may sue alone: 2 Vent. 195. So, in an action for forcible entry upon, or detainer of the wife's land during coverture, the husband and wife may join, 1 Rol. 348, *l.* 20. Mod. 5; or the husband may sue alone: 1 Rol. 347, *l.* 27, 28. So, an action on the case against a lessee for years, for burning his house, where the husband has it for the life of his wife, may be by the husband alone, Cro. El. 461-2, or by the husband and wife. So, in an action on the case for stopping a way to the wife's land, they may join, *ib.* 419; or the husband may sue alone. So, for inclosing land of which the wife has common, 2 Bulst. 14, or for not grinding at the wife's mill, 1 Wils. 224, they may join, or the husband may sue alone. So, in debt on stat. 2 Ed. 6, c. 13, for not setting out tithes which the husband has in right of his wife, they may join, Cro. El. 608, 613, 1 Jac. 325, Mod. 912; or the husband may sue alone: Jenk. 1 Str. 229. In detinue of charters of the wife's inheritance, husband and wife may join, 1 Rol. 347, *l.* 49; or the husband, it should seem, may sue alone; and so in trespass, *ib.*

On the death of the wife, the husband may sue for an injury to the wife's land during the coverture, Com. D. Bar. & F. Z.; but, for an injury by the mere personal sufferings of the wife, he cannot, on her death sue: Freem. 225; Yelv. 89. On the death of the husband, any action for a tort committed to her or her property before marriage, or to her person, or real property, during marriage, may be in her name: R.

T. H. 398-9; Palm. 313; Com. D. B. & F. 2, a. A *feme covert* [\*569] *executrix* or *administratrix*,\* ought to be joined with her husband in an action for an injury to the deceased's estate: Salk. 114; Bro. B. & F. pl. 85.

In an action on a contract by the husband only, and when the wife should have been joined in the action, the objection should be pleaded in abatement, and not in bar, though the husband might sustain a writ of error, 3 T. R. 631, and, where she marries pending the suit, her coverture must be pleaded on the first occasion, or it will not be admitted in evidence: *Morgan v. Painter*, 6 T. R. 265. But, when a *feme* improperly sues alone, without having any legal right of action, she will be nonsuited, *Cundell v. Shaw*, 4 T. R. 361, and it will be a ground of demurrer, where she improperly joins in an action with her husband, who ought to sue alone, 1 Salk. 114, or the judgment will be arrested, Cro. J. 644, or reversed on a writ of error: 2 W. Bl. R. 1236. Where the husband sues alone when the wife ought to be joined, either in her own right or in *autre droit*, he will be nonsuited, 1 Salk. 282; and, where it appears on the record, it will be fatal on demurrer, in arrest of judgment, or on error: 1 Str. 229. The mistakes as to joinder, of husband and wife in actions for torts are nearly similar to those on contracts. Where the wife is improperly joined in the action, and the objection appears from the declaration, it will be ground of demurrer, arrest of judgment, or writ of error, 1 Salk. 119; though after verdict, the mistake may be aided by intendment: 1 Chit. Pl. 634. If the husband sue alone where the wife ought to join, either in her own right or in *autre droit*, he will be nonsuited; for though in general the nonjoinder of plts. in an action for a tort can only be pleaded in abatement, 1 Chit. Pl. 64, this, however, occurs

where the party suing had a legal interest in his own right in the property affected; but the husband, in the case of a battery of his wife, has received no personal injury, unless a loss of her society, or expense incurred: 1 Chit. Pl. 65.

**FORM OF PLEADINGS.]** When the wife is a co-plt. in an action *ex contractu*, no cause of action can be included, unless it be founded on a contract with the wife before marriage, or she be the meritorious cause of action; and her interest must be expressly stated in every count; 1 Chit. Pl. 183; 2 W. Bl. R. 1236. And, in an action in form *ex delicto*, for a personal injury, if the wife be joined, the declaration must proceed only for torts to her husband, and not for such wrongs as only affect the husband: *ib.* And for torts to the person, or personal property, if she be joined, the nature of her interest therein must be expressly stated: 1 Chit. Pl. 184. And an action on the case cannot be supported against the husband and wife, for words spoken by both: *ib.*, Bac. Ab. *Actions, C.*; 2 Wils. 227. And, in an action against husband and wife, on her contract before her marriage, a count on a promise by the wife, or of the husband and wife after the marriage, to pay the debt, is bad, and cannot be joined: *ib.*; 1 Taunt. 212; Palm. 313. As to the language of the breach in an action of assumpsit, see 3 Wils. 308; 1 Ld. Raym. 284; 1 Vent. 109. In a case of a note or bond payable to the wife, it would sufficiently appear from the instrument itself, without further averment in the declaration, that she had a peculiar interest: 2 W. Bl. R. 1236; 1 H. Bl. 106; 2 M. & S. 396. In an action by the husband only, on a note payable to the wife, he may allege it to have been payable to him: 4 Moo. 71-2. In a declaration by husband and wife, concluding to the damage of both is proper: Com. D. *Pleader*, 2 a. 1.

In an action by husband and wife, the plea of the general issue admits the marriage: B. N. P. 20; Com. D. Ab. E. 6: Archb. Pl. & Ev. 274. As to the mode of taking advantage of a misjoinder or nonjoinder, see *supra*.

### \* *Precedents.*

[\*570]

#### DECLARATION BY HUSBAND AND WIFE FOR WORK, &c., BY THE FEME BEFORE MARRIAGE.

(*Venue*) (to wit.) A. B., and C., his wife, complain of E. F., being, &c., for that whereas the said deft., whilst the said C. was sole and unmarried, to wit, on, &c. (*some day before the marriage*), at, &c., was indebted to the said C. in the sum of £—, of lawful, &c., for the work and labour of the said C., by her the said C., before that time done, &c., for the said deft., and at his special instance, &c. (*or as the cause of action may be*;) and, being so indebted, he the said deft. in consideration thereof, afterwards, and whilst the said C. was sole and unmarried, to wit, on, &c., aforesaid, at, &c., aforesaid, undertook, &c., the said C. to pay her the said sum of money, when he, the said deft., should be thereunto afterwards requested. (*The quantum meruit thereon is as follows*;) And whereas, also, afterwards, and whilst the said C. was sole and unmarried, to wit, on, &c., aforesaid, at, &c., aforesaid, in consideration that the said C., at the like special instance, &c., had before that time done, &c. he, the said deft., undertook, &c., the said C. to pay her so much money as she, &c. And the said A. B., and C., his wife, aver that the said C. whilst she was sole and unmarried, therefore reasonably deserved to have, &c., whereof, &c. (*Add the other common counts, and the accounts stated with the feme before marriage*.) Yet the said deft. not regarding, &c. but contriving, &c., to deceive and defraud the said C., whilst she was sole and unmarried, and the said A. B., and C., his wife, since their intermarriage, in this behalf hath not yet paid the said sums of money or any part thereof, to the said C., whilst she was sole and unmarried, or to the said A. B., and C., his wife, or either of them since their intermarriage, (although often

requested so to do;) but he to do this hath hitherto wholly refused, and still doth refuse, to pay the same, or any part thereof, to the said A. B., and C., his wife, to the damage of our said lord the king, and to the damage of the said A. B., and C., his wife, of £—; and therefore they bring their suit, &c. Pledges, &c.

BY HUSBAND AND WIFE, FOR A BATTERY OF WIFE.

For that the said deft., on, &c., with force and arms, &c., assaulted the said C., then and still being the wife of the said A. B., to wit, at, &c., and then and there beat, bruised, and ill-treated her, and other wrongs to the said C. then and there did, against the peace of our said lord the king, and to the damage of the said A. B., and C., his wife, of £—; and therefore they may bring their suit, &c. Pledges, &c.

BY HUSBAND ALONE FOR THE BATTERY OF HIS WIFE, *per quod*, &c.

For that the said deft., &c., with force and arms, &c. made an assault on C., then and still being the wife of the said plt., to wit, at, &c., and then and there beat, bruised, and ill-treated her, so that she, the said C., by means of the premises, then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for the space of — weeks then next following; whereby he, the said plt., during all that time, lost and was deprived of all the comfort, benefit, and assistance, of the said C., his said wife, in his domestic affairs, which he might and otherwise would have had; but thereby, also, he, the said plt., was then and there forced and obliged to pay, lay out, and expend, and hath necessarily paid, laid out, and expended, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the endeavouring to heal and cure the said C., his said wife, of the sickness, soreness, lameness, and disorder, aforesaid, occasioned as aforesaid, to wit, at, &c. aforesaid, and other wrongs to the said plt. then and there did, against the peace of our said lord the king, and to the damage of the said plt. of £—; and therefore he brings his suit, &c. Pledges, &c.

See forms of declarations by husband and wife, executrix, &c., 2 Chit. Pl. 105, 112; by husband only, on note to wife whilst *covert*, &c. *ib.*, 136, 163; debt by, on bond to *feme* before coverture, *ib.* 464; covenant relating to, on separation deed, *ib.*, 526; by heir against executor of husband, for not levying a fine, *ib.*, 543; see title of estate in fee in right of wife pleaded, *ib.*, 561, 564, 570, 573, 581; declaration by husband for crim. con. *ante*, 395; for injury to wife, by upsetting of coach, 2 Chit. Pl. 712.

[\*571]

\*Evidence.

The evidence in actions by husband and wife will, for the most part, be the same as in other cases, except in proving the circumstances stated in the declaration, which entitle the wife to join in the action; as to which, see *ante*, 566. As we have seen, if the husband sue alone, on a contract made by the wife before coverture, he will be nonsuited, whether the breach be before or after coverture: *ante*, 568; Bac. Ab. *B. & F. K.*; Salk. 282; 1 M. & S. 180.

*Proof of Marriage.*] In an action by husband and wife, if the marriage is not specially denied by the plea, it is admitted: B. N. P. 20; Archb. Pl. & Ev. 274. If it is specially denied, plt. must prove it, and this strictly so, in an action for crim. con., as *ante*, 396; but, in other cases, *prima facie*, evidence, by reputation or otherwise, will, in general, suffice; *ante*, 9; 1 W. Bl. 367; Pea. Rep. 233; B. N. P. 114. And it may be as well here to observe, that even the declarations of a deceased person, as to the fact of his own marriage, are evidence: B. N. P. 112; *Re v. Bramley*, 6 T. R. 330.

As to the admissibility in evidence of *admissions* by the wife, see *ante*, 54, 56.

**COMPETENCY OF WITNESSES.]** The wife cannot be a witness against her husband; and a wife cannot be examined against her husband, even with his consent, 1 Hale, P. C. 47, nor can a widow be asked to disclose conversation between herself and her late husband; *Doker v. Hunter*, R. & M. 198. The admission of the wife, however, of a debt contracted as agent for the husband, has been held admissible: *Clifford v. Burton*, 1 Bing. 200; *ante*, 54, 574. Thus, in an action for goods sold and delivered, a woman is competent to prove that they were sold, not on the credit of the debt, but of her husband: *Williams v. Johnson*, 1 Str. 504; *ante*, "Agent." Whether a woman who has cohabited with a man as his wife, is hereby rendered a competent witness, seems subject to some doubt: *Campbell v. Twemlow*, 1 Price, 81, 83; 2 Stark. Ev. 711.

## II. ACTIONS AGAINST.

**FORM OF REMEDY, AND WHEN THEY MAY BE SUED, 571.**

**FORM OF PLEADINGS, 573.**

**PRECEDENTS, *ib.***

**EVIDENCE, 574.**

**FORM OF REMEDY, and when they may be sued.]** There is nothing peculiar relating to the form of remedy for injuries committed by husband and wife. In a case where a *feme covert*, without her husband's authority, contracted with a servant by deed, it was held the servant might bring assumpsit against the husband: 1 Saund. 210, *n.* 1; Hard. 71.

In actions on *contracts*, a married woman cannot be sued alone at law, *Beard v. Webb*, 3 B. & P. 105, Com. D. *Plead.* 2, *a.* 1, 3 Camp. 123; and never on a mere personal contract made during coverture, *ib.*, 8 T. R. 545, though she live apart from her husband, or have a separate maintenance, secured to her by deed, *ib.*;\* or though, after the death of the husband, she expressly promises to perform it, 1 Str. 94; and they cannot be joined on a promise by both husband and wife, as her promise is void: Palm. 313; 1 Taunt. 212. When a *feme sole*, who has entered \*into a contract, marries, the action must, in general, be brought [\*572] jointly against the husband and wife, though they state an account, and expressly promise to pay the debt or perform the contract: 7 T. R. 348. And he cannot be sued alone, even upon an express subsequent promise by himself, unless there be some new consideration for the same accruing to him, or causing an inconvenience or delay to the creditor: *ib.*; 3 P. Wms. 409.; Aleyn, 72. And, where the wife was a yearly tenant before marriage, at a rent payable quarterly, and she married before a quarter's rent became payable, it was held that, in an action to recover the quarter's rent, the wife should be joined: *Richardson v. Hull*, 1 B. & B. 50. Covenant on the warranty in a fine, or on a covenant running

\* In one case it was held that a *feme covert* living separate from her husband, and having a competent separate maintenance duly paid to her, might be sued alone on a contract made by her for necessaries. *Berwell v. Brookes*, 3 Dougl. 371. But the replication alleged that the debt was contracted after the separation.

with the land of the wife, demised by her during the coverture, may be supported against her: 2 Saund. 180, n. 9. And it is said that, upon a lease to the husband and wife for her benefit, the action may be against both: 1 Roll. Ab. 348, 350. Real actions must be brought against husband and wife, when the husband is seized in right of his wife, Th. D. 2. 5, c. 4, s. 1; or when he is seized jointly with his wife by purchase before or after marriage: *ib.* A wife may be sued alone where the husband is *civiliter mortuus*, or in exile, 1 T. R. 8; or have abjured the realm, or have been transported, *ib.*; or if he be an alien enemy out of the realm, 1 B. & P. 357; or if they have been divorced: Cro. El. 352. Where the husband leaves the kingdom voluntarily, the wife may be sued alone, upon a contract made by her during that time, 1 B. & P. 358, n. f.; but a woman, an alien by birth, and the wife of an alien, cannot be sued as a *feme sole*, if her husband has lived with her in this country, notwithstanding he has left her here, and entered into the service of a foreign state: 3 Camp. 123. By the custom of London, a *feme covert*, being a *feme sole* trader, may sue and be sued in the city courts as a *feme sole*, with reference to her transactions in London: Bac. Ab. B. & F. M.; but even there, as well as in the courts at Westminster, the husband must be made a party, for conformity: 4 T. R. 361; 2 B. & P. 93.

Where there is a cause of action against a wife, as executrix, or administratrix, the husband must be joined; but, in cases where an executor may be charged in his own right, the action lies against the husband alone. Thus, debt lies for rent upon a lease, which the wife has as executrix or administratrix: Th. Ent. 117.

On the death of the husband, the wife is liable on all her contracts made before her marriage: *Mitchinson v. Hewson*, 7 T. R. 350; *Woodman v. Chapman*, 1 Camp. 189; Com. D. B. & F. 2, C. Though, if the husband had been a bankrupt during the marriage, his certificate frees her from liability, if the debt could have been proved under it: 1 P. Wms. 249. The moral obligation that a woman is under to pay her debts is a sufficient consideration to support an express promise by her after her husband's death: 5 Taunt. 36. [Where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in England, and died abroad: Held, that the wife was not liable for goods supplied to her after his death, but before the information had been received; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties. *Sment v. Ilberry*, 10 Mees. & W. 1.] On the death of the wife, the husband is not liable to be sued, in that character, for any contract of the wife, entered into before his marriage, unless judgment had been obtained against him and his wife, before her death: 7 T. R. 350.

In actions for *torts*, where the tortious act is jointly done by the husband and wife, as trover of goods, and conversion by both, the action may be against the husband alone, for the whole may be intended the act of the husband: Com. D. B. & F. V. Actions for *torts* committed by a woman before her marriage, must be against husband and wife jointly: Bac. Ab. B. & F. L. And, for *torts* committed by the wife during coverture, as for assaults, slander, &c., or for a forfeiture under a penal statute,

they must also be jointly sued: *ib.* The wife may be jointly sued with her husband, for enticing away or harbouring the servant of another: 2 Lev. 63. And, for assaults or other wrongs, in which two persons may concur, the husband and wife may be sued jointly, for the \*act of both, and the acquittal of the husband will not preclude [\*573] plt. from recovering: 1 Vent. 93; *Reyworth v. Hill*, 3 B. & A. 688. "If goods are delivered to husband and wife, no action of detinue lies against them both for these, but against the husband alone:" *per Dodderidge, J.*, 1 Leon. 312.

With respect to the consequences of a misjoinder, or nonjoinder of the husband and wife, in the suit, if the wife be sued alone, on a contract, she must plead in abatement, *ante*, 569, or by *error coram nobis*; and the coverture cannot, in such case, be pleaded in bar, or given in evidence upon the trial, as a ground of nonsuit: 2 Str. 811. And the same rule is applicable to actions for torts committed by her before or after marriage: *ib.* But, where a *feme covert* is sued upon her supposed contract, made during coverture, she may, in most cases, plead her coverture in bar, or give it, under the general issue, in evidence: 12 Mod. 101. And, where the husband and wife are improperly sued jointly, on a contract after marriage, the action will fail as to both: Palm. 312. If the husband and wife be sued jointly for torts, of which they could not, in law, be jointly guilty, as for the slander of both, if the objection appear on the face of the declaration, deft. may demur, move in arrest of judgment, or bring error: 2 Wils. 227; Dyer, 19, a; 2 Chit. Rep. 697. The defts. may plead, in abatement, that they are not married: Com. D. *Ab. E.* 6; 3 Inst. 69; 2 Chit. Rep. 642.

**FORM OF PLEADINGS.]** There is nothing peculiar relating to the form of the pleadings, excepting that care must be taken that the plt's interest must be such as to entitle them to sue jointly or separately, as the case may be. In an action on a contract against both, for a debt due from the wife before marriage, the declaration will be bad, if it state a promise by both, or that the contract was either before or after marriage: 1 Taunt. 212; 1 B. & C. 248; 2 D. & R. 363, *s. c.* In general, when the defence is in its nature joint, several defts. may join in the same plea, or they may sever, and one deft. may plead in abatement, another in bar, and the other may demur, 2 Vin. Ab. 75, except in an action against husband and wife, when the husband must join in the plea with his wife: Com. D. 2 A. 3; 1 Chit. Pl. 48. As to the mode of taking advantage of a misjoinder or nonjoinder, see *ante*, 569. [See further as to the form of the pleadings, the following recent cases: *Williamson v. Dawes*, 2 M. & Scott, 352; 9 Bing. 292; *Stretton v. Busnach*, 1 Bing. N. R. 139; *Lockwood v. Salter*, 5 B. & Adol. 303.]

### Precedents.

#### INDEBITATUS ASSUMPSIT AGAINST HUSBAND AND WIFE, FOR GOODS SOLD TO WIFE BEFORE MARRIAGE.

— to wit. A. B. complains of C. D., and E., his wife, being, &c., for that whereas the said E., before her marriage with the said C. D., to wit, on, &c., at, &c. was indebted, &c. to the plt. for divers goods, &c., before that time sold, &c., to the said E., and at her special instance, &c.; and, being so indebted, she, the said E., in consideration thereof,

afterwards, and before her marriage with the said C. D., to wit, on, &c. aforesaid, at, &c., aforesaid, undertook, &c. (*The quantum meruit therein is as follows:*.) And, whereas, also, afterwards, and before the marriage of the said defts., to wit, on, &c., aforesaid, at, &c., aforesaid, in consideration that the said plt., at the like special instance, &c., had before that time done, &c., for the said E., she, the said E., undertook, &c., &c.; and the said A. B., avers, that he therefore reasonably deserved to have of the said E., before such marriage, the further sum, &c., whereof the said E., afterwards, and before such marriage, to wit, on, &c., there had notice. (*Add the moneys and accounts stated by the feme before marriage.*) Yet the said E., whilst she was sole and unmarried, and the said defts., since their intermarriage, not regarding the said several promises and undertakings of the said E., but contriving, &c., have not, nor hath either of them, as yet paid, &c. (although often requested so to do.) but to pay the same, or any part thereof, to the said A. B., the said E., whilst she was sole and unmarried, wholly refused; [\*574] and the said defts., have ever since their intermarriage \*hitherto wholly refused and still refuse so to do, to the damage of the said A. B., &c.

See other forms against husband and wife, executrix, 2 Chit. Pl. 109; against husband and wife, administratrix, &c. *ib.*, 114; against them, on a note made to *feme* whilst sole, *ib.* 126; against them, on bond to wife before coverture, *ib.*, 467; against administratrix of testator for waste, *ib.* 788.

### Evidence.

The evidence of the cause of action will be the same as in other cases. In an action against husband and wife, plt. must be prepared to prove all the averments in the declaration, entitling him to sue them jointly, or he will be nonsuited, *ante*, 571; and, in an action against the husband only, if the contract be stated to have been made by him, when, in fact, it was made by the wife before marriage, or against his authority after marriage, the plt. will be nonsuited. If the wife be sued alone, on proof of the coverture, plt. will be nonsuited. As to evidence of coverture, see *ante*, 571.

*Evidence in Action against Husband, to render him liable for Wife's Contracts.*] Where husband and wife live together, and she orders goods, the *prima facie* presumption will be, that she did so as her husband's agent, B. N. P. 134; particularly where she has been permitted by him to purchase articles for the use of the house and family: 1 Sid. 128. In these cases, the authority, either express or implied, of the husband, *Montague v. Benedict*, 3 B. & C. 635, is the test by which all cases must be determined, in regard to the husband's liability to answer for his wife's engagements, whilst they cohabit, as a married woman cannot make any contract to bind her husband, except by his express or implied authority: 8 T. R. 545. Upon this ground, since the husband is bound to supply his wife and family with necessaries, such as lodgings, clothes, and subsistence, if she contract for, or purchase necessary food and apparel, whilst living with her husband, or if she incur debts for her own necessaries when he neglects to provide them, whilst they cohabit, his authority to her, as his agent, to procure them for her own use, will be implied by the law, and he will be obliged to pay for them: 1 Vent. 42. But this implication will be repelled, if, whilst husband and wife live together, the articles purchased by the wife are such as cannot be considered necessaries, so that, in the absence of the husband's express authority, it appears requisite to prove, that, in other instances of the like kind, the wife was in the habit of purchasing similar articles with the concurrence of her husband, *Morten v. Withers*, Skin. 349; for, if the goods are unsuitable



to her rank in life, either in kind or quantity, and to her husband's circumstances, his authority for the contract or purchase will not be implied: 2 B. & C. 631. The presumption of the husband's liability may be rebutted by proving that the credit was given to her, and not to the husband: *Bartley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22. [Where the defendant's wife ordered goods of the plaintiff, to be sent to the house of a relation of the defendant's; upon the following day the plaintiff saw the defendant, and the latter accepted a bill for the price, which he paid when due, and then ordered goods to a small amount from the plaintiff for himself. His wife subsequently ordered other goods of the plaintiff, to be sent to the same place as the former. In an action for the price of these goods, held, that there was evidence to go to the jury of the husband's having so conducted himself as to lead the plaintiff to believe that the wife had his authority to order them: *Filmer v. Lynn*, 4 Nev. & Man. 559.] The presumption of assent during the cohabitation of the husband and wife, is so strong, that even the adultery of the wife, during that period, does not destroy it. Thus, where deft.'s wife, having committed adultery, he left her in his house, with two children bearing his name, but without making any provision for her in consequence of the separation, and she continued in a state of adultery, it was held, that the husband was liable for necessaries furnished to her; it not appearing that plt. had notice of the adultery: *Norton v. Fazan*, 1 B. & P. 226.

Where the husband and wife have parted by consent, he will be liable for necessaries supplied to her, unless she has a sufficient separate allowance, *Hodgkinson v. Fletcher*, 4 Camp. 70, and unless the plt. has notice of such separate allowance, *Rawlins v. Vandyke*, 3 Esp. Rep. 250; though it will afford sufficient proof of notice if the fact [\*576] were notorious in the place where the credit was given: *Todd v. Stokes*, 1 Ld. Raym. 444. Notice to a tradesman's servant is sufficient notice to the master: Salk. 118. And, where the husband and wife have lived separately for a length of time, and she has sufficient resources of her own, of which the plt. has notice, the husband will not be liable: *Ludlow v. Wilmot*, 2 Stark. 88. A husband will be liable for necessaries, though a suit for alimony be pending in the Ecclesiastical Court, and though a decree be afterwards made, directing him to pay alimony from a time previous to the supplying the necessaries: *Keegan v. Smith*, 5 B. & C. 375. The husband's liability ceases after a divorce, *ab initio*: *Ansley v. Manners*, Gow, C. 10. Where the wife is sentenced to a temporary confinement for a crime, the husband has been held not to be liable for necessaries, if she be kept in an improper place by the crime of the gaoler: Str. 1122. But, where the wife is confined for felony, and the gaoler provides her with food, the husband is liable: *Scott v. Manby*, 1 Sid. 118.

Where the husband expressly warns a tradesman not to trust his wife, he cannot be charged with goods subsequently provided, Salk. 118; though a general prohibition will not rebut the presumed power of the wife to bind her husband by her contracts for actual necessaries: 1 Sid. 127. Where a husband wrongfully turns away his wife, or where he refuses to take her back without any reason, when she has absented herself, and has not committed adultery, he cannot, by a general advertisement in the newspapers, or by particular notice to individuals not to trust her, remove his liability for necessaries furnished to her while so living apart from

him: 1 Ld. Raym. 444. And, if the husband treat his wife in so cruel a manner as to oblige her to leave her home, this is equivalent to expelling her: 1 Esp. Rep. 441. And it would seem to have the same effect if he rendered it impossible for her to remain in her home by bringing a woman of bad character to live there: *Aldis v. Chapman*, 1 S. N. P. 281; 2 Stark. 87; *sed vide* 3 Taunt. 421.

Where the wife is guilty of adultery, and either elopes from her husband, or is by him expelled from his house on that account, or where she leaves him, though from his cruelty, and commits adultery, and he refuses to receive her, he will not be liable for necessaries, although he do not, either generally or specially, notify persons not to trust her, and although he has himself committed adultery: *Govier v. Hancock*, 6 T. R. 603; *Morris v. Martin*, 1 Str. 647; *Ham v. Toovey*, S. N. P. 560; *Child v. Hardyman*, 2 Str. 873. But if he take her back, he is liable: *Harris v. Morris*, 4 Esp. Rep. 41.

[Though a husband will not be liable to any extent if his wife be living apart in adultery, the verdict in an action of *crim. con.* being *inter alios partes*, is not evidence in the action for supplies to her; and if the husband inform the tradesman that she is living in adultery, he will not be liable *beyond* necessaries, although he does not prove the adultery: *Hardie v. Grant*, 8 Car. & P. 512.]

As to what are *necessaries*, exclusive of board and lodging, they consist of such articles as comport with the wife's situation in life, and her husband's fortune, and which are usually worn or possessed by persons in similar conditions of life. Thus, in *Berrebloch v. Michael*, Cro. J., 257, 8, it was objected against the consideration, because the declaration was in regard to Lord Burgh (the husband,) that he was indebted to the plt. in £25, for plate sold and delivered to Lady Burgh, to his use; but that there was no averment that the husband agreed thereto, or that it came to his use. But, as the plate was necessarily to be intended to have come to the husband's use, or to have been bought with his consent, the court overruled the objection.

*Proof of Marriage.*] It is incumbent on the plt. to show, either that the deft. and the woman to whom the goods were supplied are married, which will establish the deft.'s liability, unless he is able to rebut the presumption on some of the above grounds, *Car v. King*, 12 Mod. 372; or it will be sufficient to show, that she and the deft. cohabited, and lived in his house, and passed as man and wife, with his assent; and it will not avail deft., though he prove that plt. knew her not to be so: *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245. But deft. will not be liable after he has separated from her: *Monro v. De Chemont*, 4 Camp. 215.

[\*576]

## \*ILLEGAL CONSIDERATION.

PLEADINGS AS TO.] Illegality in a transaction is never presumed, on the contrary, every thing is presumed to have been legally done, until the contrary is proved: 1 B. & A. 463. No mode of pleading can enable the plt. to recover on a contract, where part of an executory consideration was

illegal: 6 East, 570; 8 East, 7. Under the general issue, the deft. may give in evidence the want of sufficient or legal consideration for the contract, or illegality in the contract itself, 1 Chit. Pl. 417; the deft. is, however, at liberty to plead it specially: *ib.* 421. And, in an action on a specialty, where a legality of consideration is objected, it must, in general, be specially pleaded: 2 W. Bl. R. 1108; 1 Saund. 295, *b.* But it need not be pleaded, if the deed was void at common law *ab initio*: 5 Co. 119; 2 Wils. 341, 347; *sed vide* 2 Chit. Rep. 334; 2 Stark. Ev. 35.

*Replication.*] If gaming, usury, or other illegality in the consideration or contract, be pleaded, the plt. may reply that the contract was made upon a good and legal consideration, and not upon the supposed unlawful consideration mentioned in the plea: Com. D. *Pleader*, 2 W. 23.

*EFFECT OF.*] As the object of all law is to repress vice and promote the welfare of society, all demands originating in a breach of violation of its principles and enactments are void. And the test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether or not the plt. require any aid from the illegal transaction to establish his case: 7 Taunt. 246; Chit. Cont. 214. If any part of the consideration, or subject-matter of a contract, be contrary to a statute, the whole will be invalid; but, if only a portion of an agreement be contrary to the common law, the invalid part, if it can be separated from the rest, shall be rejected, and the remainder of the contract shall be established: see Chit. Cont. 228; Hob. 14; 1 Mod. 35; Cro. El. 199; 3 Taunt. 244; 5 *ib.* 746; 6 *ib.* 359; 4 M. & S. 66; 1 Saund. 66, *n.* But there are instances in which the invalidity of part of a deed, by virtue of a statute, shall not destroy the whole, and the remainder being legal and distinct, shall stand, there being no express words in the act to render the whole void: see instances of exceptions under the mortmain-property tax, and registry acts, Chit. Cont. 229; 8 East, 291; 6 Taunt. 359; 4 Taunt. 57.

Where the consideration of a contract is such as expressly contravenes public policy, as being injurious to the state, it is void on this ground: *Richardson v. Mellish*, 2 Bing. 242. A contract, the effect of which is to restrain or prevent a party from marrying, is void. Thus, a wagering contract for 50 guineas, that the plt. would not marry within six years, is, *prima facie*, in restraint of marriage, and therefore void, unless circumstances appear to show that such restraint was prudent and proper in the particular instance: *Hartley v. Rice*, 10 East, 22. Thus, where a bond was given by a widow, conditioned to pay the deft., A., £100, if she should afterwards marry again, and A., at the same time, gave her a like bond, conditioned to pay the like sum to her executors, if she would not marry again before she died, and she married again to B, they brought a bill in Chancery to have her deed delivered up; the bond was decreed to be given up, and cancelled, as being in general restraint of marriage: *Baker v. White*, 2 Vern. 215; 2 Atk. 540; *Lowe v. Peers*, 4 Burr. 2233; Wms. 364. But an agreement by deft. to allow plt. with whom he cohabited, in case they should separate, an annuity for her life, provided she should continue single, was held a valid agreement: *Gibson v. Dickie*, 3 M. & S. 463; Chit. Cont. 218. It will be a \*sufficient defence [\*577] in the case of goods sold, if it appear that they were of an illegal or prohibited quality; as, where drugs were sold to a brewer, the vendor

knowing they were to be used in the brewery, *Langton v. Hughes*, 1 M. & S. 593; or for the sale of bricks under the statutable size: *Law v. Hodson*, 11 East, 300; *Bensley v. Bignold*, 5 B. & A. 335. Where the consideration of a contract is the sale or transfer of any public appointment, though not expressly prohibited by the statutes relative to the sale of public offices, it will, however, in many cases, be void, as contrary to public policy: *Waldo v. Martin*, 4 B. & C. 319; 6 D. & R. 364. And thus, an action will not lie upon a contract for the sale by the owner of the command of a ship in the East Ind. Comp. service, if made in violation of the company's by-laws: *Blackford v. Preston*, 8 T. R. 89; see *Richardson v. Mellish*, 2 Bing. 247, 250-1; *Card v. Hope*, 2 B. & C. 661; 5 D. & R. 575. But a contract for the exchange of the command of the company's ships, entered into with their knowledge, is good: *Richardson v. Mellish*, 2 Bing. 229. Where the consideration of a contract is in general restraint of trade, it is invalid; 2 Saund. 156, 1 P. W. 181; but a partial restraint of trade, is not invalid, as, where a party binds himself not to set up as a surgeon, &c., in a certain town or within twenty miles thereof: *Hearn v. Griffin*, 2 Chit. Rep. 407; *Bunn v. Guy*, 4 East, 190. Wherever the consideration is to prevent or impede the due course of public justice, it is also invalid. Thus, an agreement to suppress evidence, to stifle or compound a prosecution for a felony or misdemeanor of a public nature, is void: *Roe d. Buxton v. Dunt*, 2 Wils. 347; 3 P. W. 279; Chit. Cont. 220; 5 Esp. Rep. 233. But the substitution of a bill of exchange for one forged at the instance of the forger, is not illegal, there being no stipulation not to prosecute for the forgery, 1 Camp. 45. And where, upon a conviction before justices for an offence against the excise, the officer to whom the warrant to levy these penalties was directed, by way of indulgence to the party, took from him a promissory note at two months for the amount, without previous authority from his superiors, it was held that the note so given was a valid security: *Sugars v. Brinkworth*, 4 Camp. 46; and see *Beeley v. Wingfield*, 11 East, 46. Where the consideration is a breach of the peace, or tends to create one, it is invalid: B. N. P. 16. And, where the natural effect of an agreement is to induce a public officer to neglect his duty, it is invalid. Thus, it would appear, that an agreement between the deft., being the town clerk and the clerk of the peace of a borough, and the plt., to recommend the latter to clients who might want an attorney for the purpose of conducting prosecutions arising in the town clerk's office, for reward to the former, is illegal: *Hughes v. Slatham*, 4 B. & C. 187; 6 D. & R. 219. But an undertaking to indemnify the sheriff in the execution of a lawful, or apparently legal act, is valid, *Arundel v. Gardiner*, Cro. Jac. 652, Raym. 279, but not if the act be illegal: 10 Co. 112; Tidd. 221. As to contracts, &c., made illegal by statutes, see, "*Usury*," "*Stock-Jobbing*," &c.

The immorality of the consideration will also furnish a sufficient defence. Thus, the printer of an immoral and libellous work cannot maintain an action for his bill against the publisher who employed him: *Poplett v. Stockdale*, R. & M. 337. Where, however, the plt. washed clothes for a prostitute, knowing her to be such, and the clothes consisted principally of expensive dresses, and some gentlemen's nightcaps, it was decied that he was entitled to recover: *Lloyd v. Johnson*, 1 B. & P. 340. But a party cannot recover for goods sold to a prostitute, where he expected to be paid out of the profits of her prostitution, and furnished her the clothes

to enable her to carry it on: *Bowry v. Bennett*, 1 Camp. 348; nor can a party recover for the price of obscene prints: *Fores v. Johnes*, 4 Esp. Rep. 97. Nor can the first publisher of an immoral and libellous work maintain an action against any person for publishing a pirated edition, *Stockdale v. Onwhyn*, 5 B. & C. 173; 7 D. & R. 625. \*Future [\*578] illicit cohabitation is an insufficient consideration to support a contract: *Walker v. Perkins*, 3 Burr. 1568. Past seduction, however, is a valid consideration, as it is considered that the object was to redress an injury inflicted on the woman: 2 Wils. 339. Past cohabitation alone is insufficient; therefore, where a declaration stated that the plt. had cohabited with deft. as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that the deft. should allow her an annuity as long as she should continue virtuous: and therefore, in consideration of the premises, and that she, (the plaintiff,) would give up the annuity, deft. promised to pay as much as the annuity was reasonably worth, it was held bad on general demurrer, as it was said that, where it was not averred that the deft. was the seducer, there is no authority to show that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature: that the cases, 2 P. Wms. 2 Wils. 339, 3 M. & S. 463, were cases of deeds, and are distinguishable from this, because they are all cases of deeds, and it is a different question whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void: *Binnington v. Wallis*, 4 B. & A. 652. Where a married man, living in the same house with his wife, cohabited for six years with another woman, who knew that he was married, but until that time had conducted herself with propriety and morality, and at the expiration of that time he ceased to cohabit with her, and gave her a bond, to secure an annuity to her for life, and the payment of a sum of money, as a provision for her children, which she had borne to him during such cohabitation, it was held that an action at law might be maintained upon it: *Ney v. Moseley*, 6 B. & C. 133.

*Proof of:*] Illegal consideration may be proved by parol evidence, in the same manner as in the case of fraud: *ante*, 528.

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ILLEGITIMACY.—See EJECTMENT, *ante*, 457, 474.

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ILLITERATE PERSON.—See WITNESS;—LUNACY.

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IMMORAL CONTRACT.—See IMMORAL CONSIDERATION, *ante*, 577.

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IMPRISONMENT.—See FALSE IMPRISONMENT.

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INCLOSURE.—See EJECTMENT, *ante*, 476;—WAY.

INDEBITATUS ASSUMPSIT.—See ASSUMPSIT, *ante*, 136–9.

[\*579]

\*INDEMNITY.—See GUARANTEE.

INDENTURE.—See DEED.

INDORSEMENT.—See BILL OF EXCHANGE, *ante*, 263; 287.

INDUCTION.—See *ante*, 462.

INFAMY.—See WITNESS.

INFANCY.

**PLEADINGS relative to.]** An infant must either sue by guardian or *prochein amy*; but the practice generally is to sue by the latter, though, if he be deft. in a suit, he must, in all cases, appear and defend by guardian: *Frescobaldi v. Kinaston*, 2 Str. 784; Co. Lit. 135, *b*, if he appear by attorney, it will be error, *Sedborough v. Raunt*, Cro. El. 569, *Odell v. Moreton*, Cro. J. 2, *Bp. of London v. Lewis*, Sir W. Jones, 432; and, in the case of several defts., if they appear by attorney, and one be an infant, it will be error, and the judgment will be recovered against all; *Bird v. Orms*, Cro. J. 289; *King v. Marlborough*, *ib.*, 303; *Grell v. Richards*, 1 Lev. 294. Where he sues or defends by his guardian, the guardian must have a warrant; but if he sues by his *prochein amy*, the *prochein amy* need not. It must, however, appear that both guardian and *prochein amy* have been admitted by the court, *Fitzgerald v. Villiers*, 3 Mod. 236; *Young v. Young*, Cro. C. 86; and they must be alleged to have been so in the declaration: *Combers v. Watton*, 1 Lev. 224. This allegation must be made, though, in fact, there have been no admission on the roll, *Swift v. Nott*, 1 Sid. 173, 4 Rep. 53, *b.*, 54, *a.*, for, if the parties have been admitted by the court, but no admission have been entered of record, leave may afterwards be obtained to enter it: Cro. C. 86. [Where an uncertificated bankrupt was appointed *prochein ami* for an infant plaintiff, the court, on motion, removed him, and appointed another. The father of a minor, as being his natural guardian, ought in the first instance to be appointed *prochein ami*; and, if his evidence is likely to be required at the trial, an application ought to be made to the court to release him, by the appointment of a proper substitute: *Watson v. Fraser*, 8 Mees. & W. 660. A *prochein ami* being a guardian appointed by the court, he

may sue without any authority from the infant. The wife of a minor, who was in India, having committed adultery, his father procured himself to be appointed his *prochein ami*, and commenced an action for *crim. con.* without the son's knowledge or authority: held, that he was entitled to do so, and that the judgment in that action would be a bar to any proceedings for the same cause of action by the son when of age: *Morgan v. Thorne*, 9 Dowl. P. C. 226.] If the infant sues by guardian or *prochein amy*, he will not be permitted to remove his guardian, or disavow his *prochein amy*, except with the assistance of a court of equity: *Goodwin v. Moore*, Cro. C. 161. [Where the suit was instituted, as next friend, by a person in low circumstances, and of immoral character, and under circumstances showing that it was not instituted for the infant's benefit, but from motives of spite, the vice-chancellor ordered a bill filed to be taken off the file, and the *prochein amy* to pay the costs: *Walker v. Else*, 2 Sim. 234.] When infants are executors, it has been held they may sue, though they cannot be sued, by attorney: 2 Saund. 213; *Rutland v. Rutland*, Cro. El. 378; 2 Str. 783. The 38 G. 3, c. 87, s. 6, disqualifies an infant executor from exercising the functions of his appointment, and directs administration to be granted to the guardian till such time as the infant attains the age of twenty-one years. If deft. have appeared by attorney, and judgment have been given against him, he may assign for error that deft.'s appearance was by attorney, though the plt. will not be permitted to take advantage of the deft.'s appearance \*by attorney as a ground of error, where the judgment has been [\*580] given in favour of the deft.: *Bird v. Pegg*, 5 B. & A. 418. [If an infant appear in person and not by guardian or *prochein ami*, it is error in fact, assignable in the court where the judgment is pronounced. *Castledine v. Mundy*, 1 Nev. & M. 635; 4 B. & Adol. 90.]

In assumpsit, infancy may be given in evidence under the general issue, *Seaton v. Gilbert*, 2 Lev. 144, *Darby v. Boucher*, 1 Salk. 279, 1 B. & P. 481, n., B. & P. 152; though it may be advisable to plead it, as it obliges the plt. to reply to one of several answers, whereas, if the general issue be pleaded, he may, at his election at the trial, rely upon either of them in answer to that plea: 1 Chit. Pl. 421. In debt on a specialty, where the deed or other instrument was merely voidable by reason of nonage, infancy must, in general, be pleaded, *Baylis v. Dineley*, 3 M. & S. 478; and so in covenant, Com. D. *Pleader*, 2 V. 4, and in account, Com. D. *Accompt. E.* 5. Where an infant devisee is sued by a specialty creditor of the devisor, he cannot pray the parol to demur by reason of his nonage; such privilege of an heir who is by descent not being extended to a devisee by the stat. 3 W. & M. c. 14, which charges the land in his hands for the specialty-debts of his devisor: *Plasket v. Bleeby*, 4 East, 485. Where a deft. waives his privilege of pleading infancy, and pleads some other plea, he will not be allowed to rely upon his infancy as a ground of nonsuit at the trial: *Derisley v. Custance*, 4 T. R. 77.

To a plea of infancy, plt. may reply that the deft. was of age, Com. D. *Pleader*, 2 W. 22, or that, after becoming of age, he ratified the contract, *Borthwick v. Carruthers*, 1 T. R. 649, *Cohen v. Armstrong*, 1 M. & S. 724. *Thornton v. Illingworth*, 2 B. & C. 824, 4 D. & R. 545, or that the goods were necessaries, and suitable to his situation in life, *Trueman v. Hurst*, 1 T. R. 40; but this replication will not be good in answer to a plea of infancy, to a count on an account stated, for an infant cannot agree

to any such account, *ib.* 42, *n.* Where, in assumpsit, deft. pleaded in abatement the nonjoinder of another party, and that other party be an infant, plt. may reply to that fact; but the replication will be bad if it state that deft. alone promised: *Gibbs v. Merrill*, 3 Taunt. 313. Where one of two contracting parties is an infant, he should not be joined as a deft.; for, if he be, and his infancy be pleaded, the plt. cannot enter a *nolle prosequi* as to him, but the action must be discontinued, and the other contracting party sued alone: *Burgess v. Merrill*, 4 *ib.* 469; *Chandler v. Parks*, 3 Esp. Rep. 76; *Jaffray v. Frebain*, 5 *ib.*, 47. Evidence of a promise made after the commencement of the action, will not support a replication to a plea of infancy, that the deft. ratified the contract after coming of age: *Thornton v. Illingworth*, 2 B. & C. 824; 4 D. & R. 545, *s. c.*; *Cohen v. Armstrong*, 1 M. & S. 724. Where, to assumpsit for a farrier's bill, deft. pleaded infancy, and plt. replied that the work was done necessarily for the horses of the deft., it was held ill; for, though the work might be necessary for the horses, *non constat* that the horses were necessary for the infant; it ought to have been a general replication of necessities: *Clowes v. Brooke*, 2 Str. 1101. Where the plt. replies that the goods furnished to deft. were necessities, and any part of the articles furnished fall within the description of necessities, the evidence ought to be left to the jury: *Maddox v. Miller*, 1 M. & S. 738.

### Precedents.

#### DECLARATION BY INFANT IN K. B.

(*Venue*) (to wit.) A. B., by E. F., who was admitted by the court of our lord the king, before the king himself here, to prosecute for the said A. B., who was an infant, within the age of twenty-one years, as the next friend of the said A. B., complains, &c.

See a form in C. P., 2 Chit. Pl. 32.

#### PLEA OF INFANCY BY DEFT.

And the said deft. by E. F., his attorney, (*or, if the deft. be still an infant, [\*581] say, "by G. H., admitted by the court of our lord the king, before\* the king himself (or, in C. P., "by the justices of our said lord the king here,"*) as guardian of the said deft., to defend for the said deft., who is an infant, under the age of twenty-one years,") comes and defends the wrong and injury, when, &c., and says, that the said plt. ought not to have or maintain his aforesaid action thereof against him, because he says that he, the said deft., at the time of making of the several supposed promises and undertakings in the said declaration mentioned, was an infant, within the age of twenty-one years, to wit, of the age of — (*the precise age is immaterial*) years, to wit, at, &c. (*venue*), aforesaid. And this, &c. (*Conclude with a verification, as post, "Pleas."*) *The general issue may also be pleaded, and, in many cases, it may be advisable to plead it.*)

See a form of plea in infancy in debt, 3 Chit. Pl. 956; parol demurrer by infant heir, *ib.*, 973; replication in assumpsit, denying infancy, *ib.*, 1146; that goods, &c., were necessities, and *nolle prosequi* to residue, *ib.*; replication that deft. ratified contract after he was of age, *ib.*, 1147; replication in debt that deft. was of age, *ib.*, 1172; to parol demurrer, confessing plea, *ib.*, 1174; rejoinder that goods, &c., were not necessities, *ib.*, 1220; that deft. did not ratify, *ib.*, 1221.

**EFFECT OF.]** The effect of infancy is, that no contract or agreement made by a party under age is binding on him, however beneficial it may



be; see, however, *Maddon v. White*, 2 T. R. 159; except its object be the providing necessaries, or it be, subsequently to his attaining his majority, ratified and confirmed by him; and, we have seen, the promise whereon such ratification is founded must have been made previous to the commencement of the action, or it will not be good: *supra*. He may, however, bind himself apprentice by indenture, *Rex v. Arundel*, 5 M. & S. 257, *Ashcroft v. Bertles*, 6 T. R. 652; but he cannot bind himself in a bond, with a penalty, conditioned for payment of interest as well as principal, *Fisher v. Mowbray*, 8 East, 330. He will not be bound by a submission to arbitration, 6 B. & C. 255; he cannot state an account, *Trueman v. Hurst*, 1 T. R. 40, *Hedgley v. Holt*, 4 Carr. & Payne, 104. An infant will not be liable as acceptor of a bill of exchange, though its consideration be necessaries, *Williamson v. Watts*, 1 Camp. 552; but see *Trueman v. Hurst*, 1 T. R. 40, *Jones v. Durch*, 4 Price, 300; though, if a bill be drawn while the party is an infant, and accepted by him after attaining his majority, he will be liable: *Stevens v. Jackson*, 4 Camp. 164. An infant will not be liable to a party from whom he has borrowed money, even though for the purpose of providing himself with necessaries, *Probart v. Knoreth*, 2 Esp. Rep. 472, n.; but he will be liable for money had and received, if he embezzle money, *Bristow v. Eastman*, Pea. Rep. 223, 1 Esp. Rep. 172, s. c. He will not be liable in an action on the warranty of a horse: *Howlett v. Haswell*, 4 Camp. 118; *Green v. Greenbank*, 2 Marsh. 485. The payment of money into court will not preclude the debt. from taking advantage of his infancy, if the proper plea have been pleaded, *Hitchcock v. Tyson*, 2 Esp. Rep. 481; nor will he be liable, where he carries on a particular trade, for work and labour done for him in furtherance of the trade so carried on, and by which he gains his livelihood: *Dilk v. Keighly*, 2 Esp. Rep. 480. Where goods were supplied to an infant to trade with, and he consumed them as necessaries in his own family, an action may be maintained against him, for them, as such, *Tuberville v. Whitehouse*, 1 C. & P. 94. But an infant will not be liable, even for necessaries, if he live under the roof of his father, by whom he is provided with every requisite which in his judgment appears to be proper: *Borrinsale v. Greville*, 1 S. N. P. 128; *Bainbridge v. Pickering*, 2 H. Bl. 1325. "It is incumbent on a tradesman, before he trusts an infant with what may appear necessaries, to inquire whether he is provided by his friends:" *Ford v. Fothergill*, Pea. Rep. 229; 1 Esp. Rep. 211, s. c.; 3 C. & P. 114. Assumpsit for money paid will lie against \*an infant, if the sum expended be to provide necessaries for [\*582] him; or, if he have been arrested for a debt incurred for necessaries, and plt. pay the debt to effect his liberation from prison, the infant will be liable: *Clarke v. Leslie*, 5 Esp. Rep. 28; *Marlow v. Pilfield*, 4 P. Wms. 558. A party, notwithstanding his nonage, will be liable to an action for a tort; and, though an action be founded on a contract, yet, if in point of substance, it be of the description of a tort, infancy will be no defence: *Bristow v. Eastman*, 1 Esp. Rep. 173. And an infant may be sued for money had and received, if he wrongfully embezzles money of his employers: *ib.*, 1 Esp. Rep. 172. An infant cannot be liable as a trespasser, either by prior command or subsequent assent: Co. Lit. 180, b. n. 4, 357, b. Where a party has contracted during his minority, and, on that account, is not liable, except for necessaries, the plt. will not be permitted to render him liable, by changing his form of remedy, and

adopting that by action *ex delicto*, as for a tort; as, where goods have been delivered to an infant on a contract, knowing him to be under age, trover cannot be maintained for such goods, 1 Sid. 129; or, where a minor hires a horse, and it is injured whilst in his possession, he cannot be charged in an action on the case for the injury: *Jennings v. Randall*, 8 T. R. 333.

With respect to what are *necessaries*, all such things as are immediately connected with the person of the infant are deemed necessaries, as meat, drink, apparel, lodgings, medicine, and education: Com. D. *Infant*, B. 5; Bac. Ab. *Infancy*, I. 3. Articles, to be necessaries, must correspond with the real circumstances of the infant, and not merely with his appearance in life. "The question of necessaries is a relative fact, to be governed by the fortune or circumstances of the infant, and proof of such circumstances lies on the plt.;" *per* *Ld. Kenyon*, *Ford v. Fethergill*, 1 Esp. Rep. 211. A livery for the servant of an infant who was a captain in the army was considered necessary to his situation in life, and he was held liable: *Hands v. Slaney*, 8 T. R. 578. Regimentals furnished to an infant who was a member of a volunteer corps have been held to be necessaries: *Coates v. Wilson*, 5 Esp. Rep. 152. Horses have been deemed necessaries, and so would the amount of a farrier's bill relating to them: *Clowes v. Brooke*, 2 Str. 1101. Necessaries supplied to the wife and children of an infant are necessaries to charge the infant: *Turner v. Trisby*, 1 Str. 168. Articles furnished to deft., though apparently necessaries, will not be deemed so, if deft. live in his father's house, who provides every thing for him, *ante*, 581; or, if he have incurred a debt for necessaries with some other tradesman, in consequence of which there was no occasion for him to incur the second debt, he will not be liable; necessary inquiry ought to have been made previously to trusting him; Peak. Rep. 329; 1 Esp. Rep. 311, *s. c.*; *Bainbridge v. Pickering*, 3 W. Bl. 1385; 1 S. N. P. 128. The education of an infant, when placed at a school by his parents, is not deemed a necessary, to charge him: *Aleyn*, 94. A chronometer was held not to be necessary for a lieutenant in the navy, who was an infant: *Berolles v. Ramsey*, Holt, 77. Articles provided for the wife of an infant, in order to their marriage, are not necessaries, though she uses them: *Turner v. Trisby*, 1 Str. 168; and see as to what constitutes necessaries: *Hedgley v. Holt*, 4 Carr. & Payne, 104.

[The defendant, an infant in low circumstances, hired of the plaintiff a house containing five rooms, at a rent of £15 per annum, in which he carried on his business as a barber. In an action for use and occupation, it was left to the jury to say whether such a house were necessary for a person in the station of life of the defendant; the jury having found for the defendant, the court refused a new trial: *Lowe v. Griffith*, 1 Scott, 458.]

An infant may, at all times, sue on a contract by him: *Warwicke v. Bruce*, 2 M. & S. 205. An infant may bring an action for a breach of promise of marriage: *ib.* 309.

The contract of an infant, made for his own benefit, according to the general principles of law, is not void, but voidable only at the election of the infant: *per* *Abbott, C. J.*, *Rex v. Chillesford*, 4 B. & C. 100; 1 D. & R. 161. Therefore, a subsequent ratification of a contract entered into during a party's infancy, after he has attained his majority, will render such contract binding: Co. Lit. 3 *a.*; Bac. Ab. *Infancy*, I. 8; *Southeron v. Whitlock*, 1 Str. 690; *Zouch v. Parsons*, 3 Burr. 1805. The con-

firmation of such contract must, however, be voluntary, and not "brought about so as to be liable to suspicion, and show he was [\*583] imposed upon; as, where an infant had contracted a debt, and two days after his coming of age was induced to give a bill of exchange to substantiate it, that would be a suspicious circumstance: *Brooke v. Gally*, 2 Atk. 34. In *Harmer v. Killing*, 5 Esp. Rep. 103, *Ld. Alvanley* said, "That the infant was discharged by his nonage for goods, not necessities, if furnished to him before his full age, but that he might bind himself by a new promise; but such promise must be voluntary, and given with knowledge that he then stood discharged by law: that where an infant, under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection which the law afforded him, such promise would not be binding." The promise confirming the contract must be express; a bare acknowledgment of the debt, by the payment of a sum on account of it, will not be sufficient: *Thrupp v. Fielder*, 2 Esp. Rep. 628. In every instance of a continuing contract, voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time, and, where he did not give such notice within four months after his attaining his majority, it would not be within a reasonable time: *Holmes v. Blogg*, 8 Taunt. 40. The notice of disaffirmance may, however, be dispensed with by the opposite party; as, where plt., an infant, and another, partners, took a lease of the deft. of premises, the premium for which lease was paid for, half by the infant in cash, and the other half by bills, drawn by deft., and accepted by the plt., in the joint names of himself and partner, the infant, the day after he came of age, dissolved the partnership; and, four months after such dissolution, the deft. sued the adult partner alone, on one of the bills, accepted a surrender of the lease from him, abandoned his action, and destroyed the other bills: held that the facts would be for a jury to determine whether deft. had not dispensed with formal notice of disaffirmance: *ib.* 35.

**EVIDENCE IN.]** If the deft. relies on his infancy as a defence under the general issue, he will have to prove the same, by calling any party who can speak to his birth. The register of his birth, with proof of his identity, is good evidence of his infancy, *Leader v. Barry*, 1 Esp. Rep. 354; but the register of baptism is not of itself enough, *Wiken v. Shaw*, 3 Stark. 69; nor is a register of the christening: *Rex v. North Petherton*, 5 B. & C. 506; see *post*, "Register."

If the plt. replies, or under the general issue, intends to show that the goods were necessities, the burden of proof of that fact lies on him, the question as to which, we have seen, is a relative fact, to be governed by the fortune and circumstances of the infant, *ante*, 582, *Ford v. Fothergill*, 1 Esp. Rep. 211; and plt. should, therefore, show those circumstances. The question as to what are necessities, is a mixed question of law and fact: *Maddox v. Miller*, 1 M. & S. 738. [Where the simple question for the jury is, whether the goods furnished to the infant were necessities, it is not necessary that the plaintiff show that inquiry had been made as to the defendant's circumstances, before he sold: *Brayshaw v. Eaton*, 5 Bing. N. S. 231. And where the mother was present at the time of the infant's ordering the goods, no inquiry as to her sanctioning the purchase need be shown by the plaintiff: *Dallon v. Gib*, *id.* 199.] The deft.

should be prepared with evidence, to rebut the plt.'s evidence that the goods were necessities, as by showing that he had necessities previously from another quarter, or that the goods were not suitable to his station and fortune. [In deciding the question whether goods supplied were necessities, the defendant may show that, at the time of the sale, his father had furnished him with goods of the same kind suitable to his condition: *Burkhardt v. Angerstein*, 1 M. & Rob. 458.] If the infancy be not denied by the replication, it is, in general, admitted; but, where the deft. pleads infancy, and the plt. replies a ratification of the promises, &c., after twenty-one, the plt. need only, in the first instance, prove a promise, and it will be incumbent on the deft. to prove his infancy: *Borthwick v. Carruthers*, 1 T. R. 668. As to what will amount to a ratification, *ante*, 589.

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INFERIOR COURT.—See JUDGMENT, and INDEX.

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\*INFORMER.—See WITNESS.

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INHABITANT.—See COMMON, *ante*, 371, and WITNESS.

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INJUNCTION.—See CHANCERY.

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### INNKEEPER, ACTIONS AGAINST.

**FORM OF REMEDY, AND PLEADINGS.]** There is nothing peculiar relating to the form of remedy or pleadings in actions against innkeepers. Assumpsit may be supported against them for any wrong done by them in the character of innkeeper: 7 T. R. 171; 5 T. R. 273; 1 T. R. 27. It is, however, more usual, and best, to declare in case: 1 Chit. Pl. 129; 2 *ib.*, 667, *n. a.* [In a case where goods had been left at an inn, to be taken up by a carrier, and lost; it was held, that however the innkeeper might be liable for negligence, trover could not be maintained against him: *Williams v. Geese*, 3 Bing. N. S. 549; & 7 Car. & P. 777.]

Where the declaration is framed in case, on the obligation of law, unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which gave rise to the deft.'s particular duty or liability: 5 T. R. 149. The declaration must show that deft. was a common innkeeper: Dig. 266, *b.*; 8 Co. 32, *b.* A misrecital of the custom does not hurt: Lat. 127; 2 Cro. 224. It is unnecessary, though usual, to state such custom: *ante*, 326; 1 Wils. 281. In proceeding against an hotel-keeper, he should be declared against as such: *Jones v. Osborn*, 2 Chit. Rep. 484; 3 B. & A. 283. The plea of not guilty will suffice, though the deft. has matter of excuse, as that his inn was full, &c.: 1 And. 29; Com. D. Pleader, 2 Q.

**PRECEDENTS.]** See form of declaration in case against an innkeeper, for the loss of a box, 2 Chit. Pl. 667; against an innkeeper, for refusing to lodge plt., *ib.* 668; and other precedents; 8 Wentw. *Index*, 44, 47-8.

**EVIDENCE FOR PLAINTIFF.]** An innkeeper, like a carrier, is in the nature of an insurer of the safety of personal property entrusted to his care: 5 T. R. 273; 1 T. R. 27; Jones, 104. [He is also responsible for money belonging to his guest, *Kent v. Shuckard*, 2 B. & Adol. 803. Even though a guest direct valuable goods to be placed in the public room, if the innkeeper do not require them to be removed to a safer place, he is liable as an insurer, in the event of the goods being stolen; *Richmond v. Smith*, 2 M. & R. 235; 8 B. & C. 9. In this case the innkeeper was held liable, although he proved that according to the usual practice of his house, the luggage would have been deposited in the guest's bed-room, and not in the public-room, if no order had been given by him respecting it.] In actions by a guest against an innkeeper, to recover damages for the value of things lost, plt. must prove that he was a guest, and using the inn as such, and had been so received, *Bird v. Bird*, 1 And. 29, *Bennett v. Miller*, 5 T. R. 273; and it is not necessary that the guest should be a traveller, *Thompson v. Lacy*, 3 B. & A. 283; that deft.'s house was a common inn for the reception of travellers, it will be sufficient for plt. to prove that he is in the habit of receiving all sojourners and travellers, and providing lodging and entertainment at a reasonable price; and therefore a house of public entertainment in London, where beds, provisions, &c., are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches and wagons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers: *Thompson v. Lacy*, 3 B. & A. 283. It must also be shown that the things were brought to the inn, that they were the plt.'s property, and \*that they were lost from the negligence of the inn- [\*585] keeper or his servants: 1 Rol. 2, l. 35, 47; 8 Co. 32. [When a guest arrives at an inn with a horse and carriage, and gives directions to the ostler to take his horse in, but says nothing about the vehicle, a promise to take it into the inn may be implied: *Jones v. Tyler*, 3 Nev. & M. 576. A., on a fair day, coming to an inn with a horse and gig, orders the horse to be put into the stable, but gives no special directions about the gig. The horse is put into the stable, and the gig is placed with other carriages in the public highway, near the house, where it is the practice of the inn to put carriages on fair days. The gig is stolen. The innkeeper is answerable for the loss. *Id. ib.*] The action lies, though the plt.'s servant, 1 Rol. 3, l. 40, Lat. 127, 2 Bro. 224, or his friend, Yel. 162, were the guest. The value of the goods should be proved.

Where the action is against the innkeeper for refusing to receive a person as a guest, the plt. must show that the deft.'s house was a common inn, that he came to it, and required to be entertained, and offered to pay for what might be furnished to him, and that he was refused: Keilw. 50; Dyer, 158.

**EVIDENCE FOR DEFENDANT.]** Where plt. proceeds for the loss of his things, the deft. may show that his house was broken open, and a forcible robbery of them committed by thieves, 1 Bl. Com. 430; or that they were

taken by the guest's own servant or companion, *Burgess v. Clements*, 4 M. & S. 310, 8 Co. 33, a.; or merely through his own negligence: *ib.*, *Dyer*, 266. And deft. may prove that the guest deposited his goods in a room which he uses as a warehouse, and of which the guest had the exclusive possession: *Furnworth v. Packwood*, 1 Stark. 249. But, though the plt. had the key of his chamber delivered to him, and did not shut the door of his chamber, deft. would still be liable, Com. D. *Action on the Case for Negligence*, B. 1; and so he would, though the plt. went to view the town for any time, or stayed away a considerable time, *ib.*; or though the goods were put by the deft. out of the inn: *ib.* Deft. may prove, in answer, that he told the plt. that his house was full, and that he could not accommodate him, but the plt. said that "he would shift or take his chance;" and if his goods were afterwards lost, the deft. would be discharged, as he did not receive the plt. as a guest: 8 Co. 22. But, where an innkeeper refused to take charge of goods till a future day, because his house was full of parcels, and the owner afterwards stayed in the inn as a guest, and the goods were stolen during his stay, it was held that deft. was liable, *Bennett v. Miller*, 5 T. R. 273; or he may prove that he desired the plt. to put the goods in a particular place of safety, which he neglected, and that the goods were thereby lost, or that plt. ordered the goods to be placed in some place out of the inn; as, where he ordered his horse to be turned out to grass, which was lost, 8 Co. 22. If the property lost were goods, deft. may show that they were things which plt. kept at his inn, where plt. was not a guest, and that, as the innkeeper derived no benefit from them, he was not bound to take charge of them, Cro. J. 88, as he would be in the case of horses standing in his stables: 1 Salk. 388. Deft. may also show that plt. was not a traveller or guest, but merely a neighbour or friend, who received his lodgings gratuitously, out of mere kindness: 1 And. 29; Moo. 78.

Where the action is for not receiving deft. as a guest, deft. may show that his house was full, and that he had no further accommodations, *Dyer*, 158, 1 Rol. 3, l. 45; and see the observations on this action in 5 T. R. 143, 8 Co. 32, 2 Raym. 909. [Quere, whether, since the decision of the Court of Exchequer, in *Sunbolf v. Alford*, 3 Mees. & W. 248, the defendant could show that the guest came without luggage, and had no means wherewith to pay for his accommodation? In that case, the court held, that an innkeeper cannot detain the person of his guest, nor take off his clothes to secure the payment of his bill. The doctrine of lien on the body of a debtor has been further illustrated in a very recent case. Where a gaoler refused to deliver up the body of a person who had died whilst a prisoner in execution in his custody, to the executors of the deceased, unless they would satisfy certain claims made against the deceased by the gaoler, the court of Q. B. issued a mandamus peremptory in the first instance, commanding him to deliver up the body to the executors: *Regina v. Fox*, 2 Q. B. Rep. 246. And his act was held indictable: *Ibid.* 248.]

#### INQUIRY, WRIT OF, EVIDENCE ON.

In executing a writ of inquiry, as the deft. admits that plt. has a cause of action, as stated in the declaration, by suffering judgment by default,

all the plt. has to prove, or the deft. will be allowed to dispute, is the amount of the damages: *De Gaillon v. L'Aigle*, 1 B. & P. 368. Therefore, in an action on a bill of exchange or promissory note, it need not be proved, though it must be produced, to satisfy the jury, that no money has been paid on it: *Green v. Hearne*, 3 T. R. 301. And it cannot be objected that the bill is on a wrong stamp: 2 Show, [\*586] 422. And it has been held that a lease, mentioned in the condition of a bond set out by the deft. upon oyer, need not be proved: *Coltins v. Rybot*, 1 Esp. Rep. 157. In an action on a contract, the deft. will not be allowed, even in mitigation of damages, to give evidence of fraud, or of any other matter which would render the contract void, as he admits the validity of the contract, by suffering judgment to go by default: *B. Ind. Comp. v. Glover*, Str. 612; 1 B. & P. 363. Nor can deft. go into evidence of matter which forms a ground of set-off: *Carruthers v. Graham*, 14 East, 578. In trespass, or in other actions, where the damage actually sustained by the plt. is the measure of the damages to be given by the jury, if the plt. do not prove the nature of the injury, and the amount of the damage sustained by him, the jury are to imply the amount of the damages from the nature of the injury, and they may give more than nominal damages, without any evidence of the damages being given: *Tripp v. Thomas*, 3 B. & C. 427; 5 D. & R. 276. But the deft. is entitled to nominal damages, though he do not produce the bill. *Marshall v. Griffin*, R. & M. 41; 1 Chit. B. 372. Where the action is founded on the instrument itself, letting judgment go by default is an admission of the cause of action, and of the deft.'s liability to the amount of the bill. 3 Wils. 155; *Skeppard v. Charter*, 4 T. R. 275. Such persons only should be admitted as witnesses as are competent in a trial at *nisi prius*, and they should be regularly sworn.

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INQUISITION.

**EFFECT OF.]** An inquisition, when properly made, is conclusive evidence against all parties and privies to it, but not as against strangers. A sheriff's inquisition, to ascertain the value of property, for the information of the sheriff, is not conclusive, or, as it seems, admissible evidence against the sheriff: *Luckow v. Eamer*, 2 H. Bl. 437. Nor is it evidence, in his favour: *Glossop v. Role*, 3 M. & S. 175. An inquisition of *felo de se*, taken before a coroner *super visum corporis*, was formerly considered conclusive evidence of the fact against the executors or administrators of the deceased, 3 Inst.; it is, however, now held, that such inquisition may be removed into K. B. and traversed, 1 Saund. 362, (n.); and so on an extent; 1 Y. & J. 249; 4 Bing. 96; 6 D. & R. 188. The inquisition of *fugam fecit* is, however, still held (though not, as it seems, upon principle) to be conclusive, *ib.* Inquisitions of lunacy are evidence, even against third persons, who are strangers to the proceeding. Thus, where an inquisition of lunacy was offered as evidence to affect the rights of third persons, and objected against as *res inter alias acta*, the objection was overruled by *Lord Hardwicke*, saying that inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, &c., are always admitted to be read, but not conclusive: 2 Atk. 412; 1 Ph. Ev. 356. And an in-

quisition under a commission from the Court of Exchequer, to inquire whether a prior, or the crown, after the dissolution of the priory, was seized of certain lands, was held to be admissible, but not conclusive evidence, as to the facts stated in the return: *Toker v. Duke of Beaufort*, 1 Burr. 146. And the surveys of the commissioners appointed by act of Parliament, during the time of the commonwealth, are admitted in evidence: *Underhill v. Durham*, 2 Gwill. 542; *Bullen v. Michel*, 4 Dow, 325; *Rowe v. Ireland*, 11 East, 284. And in an action on a bond against the executors of the obligor, an inquisition of lunacy has been admitted under *non est factum*, for the purpose of showing that the obligor had been a lunatic from a certain time, as found by the inquisition: *Faulder v. Silk*, 3 Camp. 126.

[\*587] \*PROOF OF.] In cases of general concern, and where the inquisition is of great notoriety, it seems, it requires no proof, such as the return to the inquisition in *Hen. 8th's* time: B. N. P. 228. But, in other cases, it must be shown, the inquiry was made under proper authority, as in the case of an inquisition *post mortem*, and such private offices. The return cannot be read without also reading the commission, unless, as it seems, the inquisition be old: Vin. Ab. *Ev. A.*, b. 42. The inquisition, if filed of record, should be proved, as other records: see "*Judgment*," "*Record*."

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## INSOLVENT DEBTOR.

PLEADINGS, *relative to*.] In actions against an insolvent debtor, upon any cause of action arising before his actually being in custody, he may plead, generally, "that he was duly discharged according to the act, by the order by which the discharge was obtained, and that the discharge remains in force," without pleading any other matter specially, 7 G. 4, c. 57, s. 28; unless the Insolvent Act gives the general form, the plea must show in what manner the debt. was discharged: 8 East, 48; Willes, 199. The discharge cannot be given in evidence under the general issue: Com. D. *Pleader*, 2 G. 61. If plt. agree to abandon his debt, and request debt. not to insert it in his schedule, the debt. may give that in evidence as a defence under the general issue, and it need not be pleaded specially: 3 Moo. 234; see D. & R. 600. It seems the discharge of the plt., as an insolvent debtor, is a good defence under the general issue: 3 Camp. 236; 1 C. & P. 146. Any other plea may be pleaded. When a discharge under the Insolvent Debtors', or Lords' Act, is pleaded, the replication may either deny the fact, 3 Went. 200, or reply that the discharge was obtained by fraud; or, in the former case, the plt. may admit the plea, and take judgment for his demand, to be levied of the future effects: *Buxton v. Mardin*, 1 T. R. 80; Com. D. *Pleader*, G. 16.

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## Precedents.

### DECLARATION BY THE ASSIGNEE OF AN INSOLVENT DEBTOR.

(*Venue*) (to wit.) A. B., assignee of an estate and effects of C. D., heretofore an insolvent debtor, and discharged under and in pursuance of an act of Parliament, now in



free, for the relief of insolvent debtors in England, in pursuance of and by virtue of that act, and an assignment of such estate and effects to him, the said A. B., in that behalf duly made, complains, &c., for that, whereas, before the said C. D. was so discharged, &c., and before the said assignment to the said plt., on, &c.

PLEA OF DEFT.'S DISCHARGE UNDER INSOLVENT ACT.

(*Actio non, as post, "Pleas."*) Because he saith that heretofore, to wit, on, &c. (*day of order of discharge,*) to wit, at, &c. (*venue,*) by a certain order made by a Court for Relief of Insolvent Debtors in England, he, the said deft., then being an insolvent debtor in custody, was duly discharged, according to the act of Parliament then in force for the relief of and concerning insolvent debtors in England, in such case made and provided, of and from the said several proposed promises and undertakings and causes of action (*if any,*) and each and every of them, in the said declaration mentioned, and that the said discharge still remains in full force, and this he, the said deft., is ready to verify; wherefore he prays judgment if the said plt. ought to have or maintain his aforesaid action thereof against him, &c.

See another form, 3 Chit. Pl. 919; plea of plt.'s discharge under, *ib.*, 921; replication that deft. promised after discharge, *ib.*, 1150; replication denying discharge, *ib.*; replication that note was given after discharge, *ib.*; rejoinder that was contracted before discharge, *ib.*, 1230; surrejoinder that the debt was not contracted before, *ib.*, 1234.

\*EFFECT OF.] With respect to claims *against* an insolvent [\*588] debtor, the benefit of 7 G. 4, c. 57, is afforded to all persons in actual custody, upon any process for any debt, damage, cost, or money, or for any contempt of court for non-payment of money or costs. At the time of subscribing his petition, the prisoner is to execute an assignment to the provisional assignee of the court, which passes all property which he has at the time of his petition, and not subsequently acquired property, except by order of the court: *Stepper v. Marshall*, 2 Bing. 372. As to the assignee being compelled to accept the effects, see 1 Bing. 354.

The effect of the discharge is to relieve the insolvent only to the extent of the specific debts described in his schedule: *Taylor v. Buchanan*, 4 B. & C. 419; 6 D. & R. 491. But, if the insolvent omit to notice a debt in his schedule, he will not be discharged from it, unless he did so at the request of the creditor: *Baker v. Sydee*, 8 Taunt. 179; 3 Moo. 231. A description of a debt will generally be held sufficient, if it appear that deft. had no intention to mislead, and the creditor could not be deceived as to the debt, though it may not be strictly and literally correct: *Forman v. Drew*, 4 B. & C. 15; 6 D. & R. 75. Where the insolvent had given his creditor a bill of exchange for the debt, which the latter had indorsed, but the insolvent was ignorant thereof, his description of the original debt in the schedule, and statement therein, that the bill had been given, without noticing the holder, were held to be sufficient against the latter: *Reeves v. Lambert*, 4 B. & C. 214. The statutes do not, in general, discharge the insolvent from contingent debts, 2 Chit. Rep. 448. It seems, the insolvent cannot now be discharged in respect of any effects acquired by him since his discharge. If the insolvent, after his discharge, expressly and indefinitely promise to pay the debt, he may be sued on such new contract: 3 M. & S. 595; 2 Str. 1233; 2 W. Bl. 1217, 3 B. & P. 394; *sed vide* 6 Taunt. 563. The Insolvent Act does not discharge him from liability to actions for torts, as for assaults, slander, &c.; and he is not discharged from liability to an action for mesne profits, even though accruing before the discharge, the damages being then unliquidated: 3 B. &

A. 407; 2 Chit. Rep. 222, *s. c.*; 2 B. & C. 762; 4 D. & R. 490, *s. c.*; and see 1 Chit. Pl. 79-80.

With respect to claims by an insolvent, as already seen, all the legal interest of his contract vests in the assignee, or provisional assignee, if no other be appointed, (*infra*), and he should be plt. The provisional assignee may bring an ejectment, without any application to the court: 3 Bing. 303; 4 C. & P. 79, *s. c.* The insolvent, therefore, cannot sue for a debt due to him at the time of filing his petition, and which is assigned to the assignee, even though the assignees do not interfere, 1 C. & P. 146, 7 Moo. 374; nor can he sue in trover for plate acquired before his insolvency: *ib.* But, if the debt was not included in the schedule, and was not due till after discharge, he may sue for it: 2 Doug. 472. And an insolvent may, in general, sue for a debt subsequent to hearing the petition, and while in custody, 4 B. & C. 419; 6 D. & R. 491. And an insolvent may sue for after-acquired property, even against his assignees, unless they have acquired a property in it under the warrant of attorney and judgment, on which the court is authorized to issue execution, 2 Bing. 372; and see further, as to suits by and against bankrupts, *ante*, "*Bankrupt*."

**EVIDENCE.]** A true copy of the petition, schedule, order, judgment, and other proceedings, signed by the officers in whose custody the same shall be, or his deputy, certifying the same to be a true copy, without being stamped, is evidence, in all courts, of the same respectively: 7 G. 4. It is necessary, however, to prove the affidavit of notice: *Sascall v. Brown*, 3 Stark. 54. Where the debt is discharged under the Lords' Act, he must produce the rule of court by which he was discharged; [\*589] \*if he was discharged under the Insolvent Act, he must produce the order of the Insolvent Court for the debt's discharge, to prove which the original entry of the judgment of the court ought to be produced; and an order to the Marshal of the K. B. prison, or other gaoler, for the discharge of the debt, reciting the judgment, is sufficient, *Doe d. Robison v. Barton*, 2 Stark. 473; nor can the discharge be proved by parol evidence: not even by proof of the acknowledgment of the party: *Scott v. Clare*, 3 Campb. 236. But a paper, purporting to be a copy of the original discharge of an insolvent, and signed by the clerk of the proper officer of that court, with the impression of the seal affixed to it, is admissible in evidence to prove such discharge, without the production of the certificate thereof, or proof of its being an examined or attested copy: *Carpenter v. Waite*, 3 Moo. 231; *Neal v. Isaacs*, 4 B. & C. 335; 6 D. & R. 484. If the debt intends proving plt.'s discharge, besides the usual evidence thereof, as above, the plt.'s identity should be established. If plt. relies on any subsequent promise made by the debt., so as to revive the latter's liability, the same should be proved.

## INSPECTION OF WRITINGS, &c.

**PRIVATE DOCUMENTS.]** It is a general rule that a plt. shall not be obliged to furnish evidence against himself, and the court will not in general oblige a plt. to discover the evidence in support of his action before trial, 1 Chit. Rep. 476; nor can a third person be obliged, in general, to

give a copy of books, &c. of a private nature, 1 *Ld. Raym.* 705, 2 *ib.* 927. *Tidd*, 641; and see *Ratcliff v. Bleasby*, 3 *Bing.* 148, where the principle as to requiring a party to produce a written instrument in his possession is fully considered. But, where the action is founded on a written instrument, as a bill of exchange or promissory note, 1 *Bing.* 161, special agreement, or undertaking in writing to pay the debt of a third person, *Tidd*. 639, if a special ground be laid, as that the demand is of long standing, and the debt. has no copy of the instrument, or that there is reason to suspect its being forged, (*sed quære*, see 1 *Bing.* 451,) &c. the court on motion, or a Judge on summons, will make an order for the delivery of a copy of it to the debt., or his attorney, and that all proceedings in the action be in the meantime stayed: *Tidd*. 639. The Court of C. P. will not compel debt. to produce bills of exchange on which action is brought, and permit plt. to take copies of them upon an affidavit, contradicted by debt., that the bills had come into his hands by fraud, and had not been satisfied, 1 *Bing.* 161; and that court will not compel a note to be deposited in hands of prothonotary for debt. to take copy, and in order to see whether or not it was a forgery: 1 *Bing.* 451. In the Exchequer, a party interested in documents in possession of his adversary is entitled to their production: 1 *Y. & J.* 28; 1 *M. & S.* 75; 7 *Price*, 205.

Where the debt. has the custody of a written instrument which he holds as a trustee, the courts, in most cases, will order him to give an inspection and copy of it to the plt. at his expense, and to produce it for various purposes: see *Tidd*. 639; *Barnes*, 439; *Bunb.* 243. If the party does not hold it as a trustee, the court will not grant the application, and if he disputes such fact, the court will not grant it, 3 *Bing.* 150; and the court will not compel a party to allow the inspection of his title-deeds, and give a copy thereof to a person who supposes such deeds contain a reservation in his favour of manorial rights, unless it appear that the party holds the deeds as trustees for applicant: 1 *B. & C.* 262; 2 *D. & R.* 386, *s. c.* In an action for freight and demurrage by shipowners against charterer, the court will not grant the latter an inspection of the log-book kept during \*the voyage, *Rundle v. Beaumont*, 1 *M. & P.* 396; and, [\*590] in an action by the owners of a ship against a broker employed by them to procure a cargo, the court refused to order the latter to allow the former to inspect or take a copy of a letter received by him from a correspondent abroad, although he acted as such broker at the time: *Rowe v. Howden*, 1 *M. & P.* 334. It is a general rule, that, if two parties execute one deed or instrument, the one who has it holds it as a trustee for the other, on the ground that they have both an interest, see *p. Park*. *J.* 1 *M. & P.* 337; and in the Common Pleas, if one part only of an indenture be executed, the court will compel the party having the custody of it to produce it for inspection, upon an action commenced against him by the other party, unless he can show some sufficient reason to the contrary: 1 *Taunt.* 386; 1 *Moo.* 465; 8 *Taunt.* 131; 2 *Moo.* 513, *a., s. c.* But, where the debt., after settling a draft of articles of partnership with the plt., having engrossed and executed a deed, differing in some respects from the draft of the plt. refused to execute the deed, but having afterwards commenced an action for breach of agreement to take him into partnership, he moved to be at liberty to inspect and copy the deed, the court refused an order for inspection, 5 *Bing.* 148; and where two parts of an indenture were executed by both parties, each keeping one, and one part was lost,

the Court of Common Pleas would not compel the other party to produce his part, in order to support an action against him on the instrument, 6 Taunt. 302; 1 Marsh. 610, *s. c.*; for the one party executes a deed by which he binds himself, and the other executes a deed by which he binds himself, and the one having lost his part, calls on the other to produce his: it is like a case where a man having given a bond, kept a copy of it, and the other, losing the bond, applies for a copy of the copy, —we should not grant that, *p. Gibbs, C. J., s. c.*; and, upon an affidavit that no copy or counterpart of a lease on which *plt.* sued was in possession or power of *plt.*, and that the attorney who drew the lease and counterpart had absconded, court refused to order *def.*, who was in possession of lease, to permit a copy to be taken, 4 Bing. 152. In the King's Bench, when the *plt.* is entitled to the inspection of a lease, &c., in the possession of the *def.*, the court will grant a rule for the latter to produce it, and give a copy thereof to the *plt.*, in order that he may declare thereon: Tidd. 694, 640. And, where the *plt.*, in an action on a deed, has had the same taken from him, under a warrant against him for felony, the court, on an affidavit of demand upon, and refusal by, the magistrate and constable, will direct them to give the *plt.* a copy to declare on, and to produce the deed on the trial, the *plt.* undertaking to pay the expenses: 2 Chit. Rep. 229. As to inspection of papers, &c., in actions on policies of insurance; *post*, 604. By 53 G. 3, *c. 141, s. 5*, the grantor of an annuity is entitled to a copy of every deed, &c. whereby it was granted; and, if not delivered within twenty-one days after notice, a summons may be taken out, and order obtained thereon, for the production of such deed, &c., and for suffering the complainant to take copies thereof and examine the same.

In the King's Bench, the *plt.* may have a rule for the *def.* to produce a deed before the commissioners of the stamp-office to be stamped, or to the *plt.*'s attorney, in order that he may ascertain the names of the witnesses, so as to *subpœna* them. And a rule for the production of a deed to be stamped, has been granted by the Court of Common Pleas, 4 Taunt. 157, Tidd. 641; though in a former case, that court refused to make a rule on the *plt.*, in an action on a bond to allow an officer of the Stamp duties to inspect the bond, because the *def.* suspected it to be forged: 1 B. & P. 271; Tidd. 641. In *Gyner v. Bayley*, 5 Moo. 71, the *plt.*, having entered into a contract with an auctioneer, for the purchase of land by auction, and made a deposit in part of the purchase-money, and afterwards brought an action against the *def.*s. (the vendors) for interest, for [\*591] not completing the purchase according to the conditions of \*sale, the court ordered the *def.*s. to produce the contract, for the purpose of the *plt.*'s getting it stamped. But the court will not compel the *plt.* to deliver to the *def.* a copy of an agreement, in order to enable the latter to plead in abatement that the agreement was signed jointly by himself and others: 2 D. & R. 419.

Under the Judge's order to produce papers, and give copies of letters, &c., it is sufficient to give extracts of those points of them which are relevant to the subject, 1 Taunt. 167; and the court will confine their order for the inspection of a deed, &c., to the particular parts of it which are necessary to support the action: 2 Chit. Rep. 231.

**PUBLIC DOCUMENTS.]** It is a general rule that a party has a right to

inspect and take copies of such books, &c. as are of a *public* nature, where-in he has an interest, so as they be material to the suit, and the party in possession be not obliged to furnish evidence against himself in a criminal prosecution: 1 Bl. R. 44; and see Peake's Ev. 91, &c. As to the inspection of public writings in general, and if they are not evidence of themselves, the courts will order them to be produced at the trial, 1 Str. 126, 12 Vin. Ab. 104, *pl.* 68, *s. c.*, Barnes, 468, 2 T. R. 234; otherwise a copy is sufficient, and they will never make a rule to produce the original, unless it be necessary to inspect it on account of an erasure, or new entry: 1 Str. 307; Say. Rep. 76; and see Tidd, 646. The books of a *corporation* are in nature of public books; 2 Str. 954, 5, and every member of the corporation, having an interest therein, has a right to inspect and take copies of them, for any matter that concerns himself, though it be in a dispute with others: 2 Bac. Ab. *Ev. F.*; 4 B. & A. 301; 2 Str. 1223; Barnes, 235; Co. Rep. 555, *s. c.* In an action against debt., a member of a corporation, for a breach of a by-law, the court will order an inspection: 3 B. & C. 162. The books of the quarter sessions are public books, which every one has a right to inspect, 1 Wils. 297, 1 W. Bl. Rep. 39, *s. c.*, 1 Chit. Rep. 477, *a.*, Tidd. 646; but see *ib.* 479, where the general right of every man to inspect the books of the quarter sessions was doubted by *Abbott, C. J.* And every man has a right to inspect the proceedings to which he is himself a party, see Tidd, 647, 1 Str. 126. 1 Chit. Rep. 476, *a.*; but see 1 Ld. Raym. 252. Carth. 421, *s. c.*, Gilb. Cass. K. B., 134, for he has an interest in such proceedings. In an action for a malicious prosecution, where it was necessary, in order to support the action, that the *plt.* should be put in possession of the contents of examinations before justices, and of the warrant on which he was apprehended, the court granted a rule that they might be inspected, and copies taken, and the originals produced on the trial: Barnes, 468, 9. The *court-rolls*, and books of a manor, are of public nature; the tenants having an interest therein, and the lord, who has the custody of them, is considered merely as a trustee: 2 Str. 955, 1005. A *freehold* tenant of a manor has no right to inspect the court-rolls, unless there be some cause depending on which his right may be involved; 7 T. R. 746; and see 1 Wils. 104, where a *freeholder* was refused a rule to inspect the rolls of the manor, in a case between himself and the lord, touching a *copyhold*; but see Barnes, 237; 2 W. Bl. Rep. 1030; *semb. contra*; and see 2 Ves. 620; 13 East, 10; Tidd, 648. *Parish* books, and the books of the *Custom House*, *Post Office*, *Bank*, *South Sea House*, *India Company*, &c., are, to some purposes, considered as public books, and persons who have an interest therein have a right to inspect them; 2 Ld. Raym. 851; 7 Mod. 129, *s. c.*: 1 Str. 304; 1 Barnard, K. B. 455; 2 Str. 954; Barnes, 236; Tidd. 647. But the right of parishioners, merely as such, to inspect the books of churchwardens, does not exist: see 4 B. & C. 899. Some special reason must be stated to ground the application: *ib.* And access is not allowed to parish books for the trial of questions of a *private* nature, or in *collateral* actions brought by or \*against persons who have [\*592] no interest therein: Tidd. 647, and cases there cited. And, though the *East India Company* are compellable to produce their public books, 7 Mod. 129, 2 Ld. Raym. 851, *s. c.*, yet they are not obliged to produce their books of letters, 1 Str. 646, &c., nor their private books relating to the appointment of their servants: 2 Str. 717; see Tidd, 647.

As to *Custom-House* books, see 1 Ld. Raym. 705; 2 Str. 1005. In an action against a sworn broker of London, for negligence, he will be compelled to produce his books: 7 B. & C. 204.

## INSURANCE, POLICIES OF.

FORM OF REMEDY ON, 592.

FORM OF PLEADINGS, 593.—*Declaration, ib.*—*Plea, 595.*

PRECEDENTS, 596.

EVIDENCE FOR PLAINTIFF in *Actions on MARINE POLICY*, 596.—*Policy, ib.*—*Interest of Insured, 597.*—*The Inception of Risk, 598.*—*Compliance with Warranties, 599.*—*The Loss and Damages, 600, 601.*

*Effect of Payment of Money into Court, 601.*

In *Actions on LIFE POLICY.*—*Interest and Right to sue, 602.*—*Compliance with Warranties and conditions, ib.*—*Death, 603.*

In *Actions on FIRE POLICY.*—*Interest and Right to sue, 603.*—*Compliance with Warranties, &c., ib.*—*Loss by Fire, &c., ib.*

EVIDENCE FOR DEFENDANT, *Inspection of Papers, 604.*—*Fraud, &c. ib.*

COMPETENCY OF WITNESSES, *ib.*

### *Form of Remedy.*

THE ordinary remedy under a policy of insurance is by action at law; but matter sometimes arises, out of contracts of this nature, which requires the peculiar investigation and relief of a court of equity, as in cases of fraud, or where a discovery on oath is necessary, or a commission required for the examination of witnesses abroad; recourse is then had to chancery: see *R. v. Roper*, 2 Stark. 517; *R. v. Hicks, ib.* 521. As to relief in equity, where there has been a mistake in drawing up the policy, see 1 Ves. sen. 318; 1 Atk. 545.

The form of remedy by action on a policy is assumpsit, when the same is not under seal, or debt or covenant when it is under seal. A general form of declaration in debt is given against the two public incorporated companies, by 6 G. 1, c. 18, s. 4, 11 G. 1, c. 30, s. 34; see 2 Marsh. 601; and see *ante*, 359, as to the cases of charter-parties. In a case where persons, being trustees and directors of a fire-insurance company, executed a policy to indemnify A., and others, from loss by fire; whereby they ordered, directed, and appointed the directors for the time being to pay the loss which A. and others should sustain, in the event of a fire happening; and the policy, among other clauses, went on to recite certain provisions, containing the words "conditions and agreements;" and, a loss having happened, it was held that the policy was not an instrument or agreement upon which covenant would lie, and, consequently, that neither the executing parties, nor the directors for the time being, were liable at law: *Alchorne v. Saville*, 6 Moo. 202, *a.*

By a policy under seal, three of the directors of a fire association admitted the plt. to be a \*member of that society, upon the terms and conditions presented by the deed of settlement of the

[\*593]

association, and he subscribed a certain sum as the consideration money for one year's insurance; and it was declared that he should be entitled to a remuneration out of the society's funds, in case of loss by fire happening to any property therein specified, not exceeding the sums set against each article respectively; and it was further stipulated, that neither of the directors who signed the policy, nor the plt., or the holder of it, should, as members of the society, be subject or liable to any demand for loss, except under the articles establishing the society, and as was provided by the same. The plt., having sustained a loss by fire, brought an action of covenant against the directors who signed the policy, and averred, in his declaration, that the funds of the association were sufficient to satisfy the amount of such loss, and the jury found a verdict for him; held, that such declaration was sufficient, and that the defts. were liable by the terms of the policy, and the court, therefore, refused to arrest the judgment: *Andrews v. Ellison*, 6 Moo. 199.

The action at law may be brought by either the person in whose name or the person on whose account the policy was effected: *Marsh v. Robinson*, 4 Esp. Rep. 98; *Parker v. Beasley*, 2 M. & S. 426; *Hagedorn v. Oliverson*, *ib.* 485; see also, 2 B. & A. 314; 16 East, 141; 13 *ib.* 341; 2 B. & P. 155, *n.* And, though the person, whose name is used in the policy, be interested jointly with another, the action may be brought in his name separately, the joint interest being stated in the declaration: *Cosack v. Wells*, 1 Chit. Pl. 4 ed., 5. Unless an adjustment has been made, the insurer cannot be holden to bail, without a Judge's order, even though the policy may be valued on the loss total: *Lear v. Heath*, 5 Taunt. 201; 1 Marsh. 19; *Lambe v. Dubois*, *ib.* 21, *n.*; 1 M. & S. 494, 499; 5 *ib.* 439. In actions against some companies, their act of Parliament points out the parties to sue and be sued.

### *Form of Pleadings.*

*Declaration on Marine Policy.*] The averments in a declaration in debt, covenant, and assumpsit, on a *marine insurance*, are so nearly similar, that they may be considered under the same head. The venue is transitory. The general averments in the declaration relate to,—1, the policy, and memorandum annexed; 2, the deft.'s subscription; 3, the shipment of the goods, if the policy be upon goods; or the right to freight, if upon freight; 4, the names of the persons interested; 5, the sailing on the voyage, and loss; 6, the amount of damages; *Hughes on Insurance*, 483. A general form of declaration in debt is given against the two public incorporated companies, by 6 G. 1, c. 18, s. 4, and 11 G. 1, c. 30, s. 43: see 2 Marsh. 601.

The policy must be described according to its legal effect, and is usually set forth in the past tense, in the precise terms in which it was made: *Hughes*, 464. The regulations indorsed on the policy, and forming a part of it, must be stated: *Strong v. Hervey*, 3 Bing. 304. So, likewise, must all qualifications of the contract by warranties or exceptive stipulations; 3 Bing. 315; 11 East, 633; 4 Camp. 20; 1 Stark. 294; 7 Taunt. 385; 2 B. & C. 20. But clauses which do not affect the plt.'s right of action, as the enumeration of perils to which this loss is not attributed, need not be stated, though they usually are: *Cotteril v. Cuff*, 4 Taunt. 285. In a valued policy, where the goods had been estimated at too low a sum,

and the mistake was corrected by an increased sum in the margin, the policy was stated according to its altered value, without noticing the original sum, and the declaration was held sufficient: *Robinson v. Tobin*, 1 Stark. 336. It is not necessary to state that this instrument was stamped, or that the policy contained the name or firm of one of the persons interested, or of the consignor, or of the agent in Great Britain, who gave orders for the policy, according to the statute 28 G. 3, c. 56: *Bell v. Janson*, 1 M. & S. 201; 2 Salk. 519; 1 Ld. Raym. 450; 1 Saund. 276, a., note, 2. If, however, it be averred, that the persons interested answered a particular description, this averment, though unnecessary, must be proved: *Bell v. Janson*, 1 M. & S. 201, 204. If the policy was effected by an agent, it may be stated as if made by the principal insured: 2 Burr. 1198. The subscription and promise are stated next. When the policy, in the common printed form, on ship and goods, contains a memorandum, declaring the insurance to be on goods, a general averment is proper, that the deft. became an insurer on the premises mentioned in the policy: *Haughton v. Eubank*, 4 Camp. 88. If the goods were required, by the terms of the policy, to be laden at a certain port, it must be averred that they were there laden, *De Symons v. Shedden*, 2 B. & P. 153; or, if the policy be upon goods of a particular nature, or distinguished by certain marks, it must be averred that the goods in question corresponded with such descriptions: *ib.*; *De Symons v. Johnston*, 2 B. & P. N. R. 77. But, if a declaration state that the policy was upon indigo and bale goods, and that divers goods were shipped, and that the policy was *on the said goods*, it is sufficient, on special demurrer: *ib.* An averment of interest is necessary, as well in cases of a policy upon foreign as on British ships, unless there be a clause making proof of interest unnecessary, as "interest or no interest," or, "without further proof of interest than the policy," or other words to that effect: *Cousins v. Nantes*, 3 Taunt. 513; see, also, 2 East, 385; 2 Saund. 200; 3 B. & P. 75; 2 N. R. 269. The parties in whom the interest is vested must be correctly described. But, where the declaration alleged that Messrs. H. and H., at the time of effecting the policy, and at the time of the loss, were interested in the cargo, to wit, to the amount of all the money insured, and it appeared on the trial, that previous to the insurance, they had admitted others to a joint concern in the cargo, this evidence has been held to support the averment: *Page v. Fry*, 2 B. & P. 240; 3 Esp. Rep. 185; *Perchard v. Whitmore*, 2 B. & P. 155; *Hiscox v. Barrett*, 16 East, 145; Park, 603; 6 Taunt. 14; 1 Marsh. 416. But this decision seems questionable: *Hughes*, 467. If two are jointly interested, and one count state the interest in one, and another in the other, the plt. cannot recover upon either: *Cohen v. Hannam*, 5 Taunt. 101; *Bell v. Ansley*, 16 East, 141. But an averment that A., B., C., D., and certain others, trading under the firm of E. and Co., were interested, is sufficient, on motion in arrest of judgment, whatever effect the uncertain description of the persons in the firm might have on demurrer: 1 Chit. Rep. 49; *Mellish v. Bell*, 15 East, 4. It is not necessary, though sometimes advisable, to specify in what proportions several persons are interested: *Carruthers v. Shedden*, 6 Taunt. 14; 1 Marsh. R. 416. When the interest is averred to be created by certain special circumstances, the averment must be accordingly proved: *Lucena v. Crawford*, 2 N. R. 209. When the interest is stated on freight or profit,



the contract must be so stated: 2 N. R. 315. And, when it is uncertain in whom the interest is vested during a certain period, as in cases between consignor and consignee, there should be different counts, adapted to the circumstances: 2 N. R. 290. An averment of interest, at the time of effecting the policy, is immaterial; it is sufficient that the interest was vested during the period of the risk: *Rhind v. Wilkinson*, 2 Taunt. 237. A payment of money into court precludes the deft. from objecting that the amount of interest was not substantiated: 16 East, 146. The averment that the ship sailed on her voyage, is introduced to show a compliance with the requisitions of the policy. But, as every policy contains the words, "lost or not lost," whether the ship sailed before or after it was made, is immaterial; and an averment that the ship sailed after, is satisfied by proof that she sailed before: *Peppins v. Solomon*, 5 T. R. 490; 2 B. & P. N. R. 308; 6 Taunt. \*465, 466; 2 Marsh. 160; [\*595] Hughes, 469. But, where the policy was at and from a place, an averment that the ship was lost after she had sailed on her voyage, was not satisfied by proof that she was lost before she sailed: *Abiloe v. Briston*, 6 Taunt. 462; 2 Marsh. R. 157. The cause of the loss must be stated accurately, and a variance in this respect would be fatal: *Cullen v. Butler*, 5 M. & S. 461; 4 Camp. 289; *Butler v. Wildman*, 3 B. & A. 398; *Phillips v. Burke*, 5 B. & A. 161; 3 Taunt. 228. A statement of the particular facts which occasioned the loss, is sometimes preferable to ascribing it to one of the perils specified in the policy; such a statement affords, also, the advantage of being admitted, in case of payment of money into court, and of obtaining the opinion of a higher court, in case a question of law is raised upon the record: Hughes, 470. Additional counts may be framed with less particularity, to avoid the danger of variance; *ib.* The term *barratry*, being a word of art, is the best description, when the master's misconduct is the cause of the loss; but it is sufficient to say, that the goods were lost by the fraud and negligence of the master and mariners: *Knight v. Cambridge*, 1 Str. 581; 2 Ld. Raym. 1349; see, also, *Boehm v. Coombe*, 2 M. & S. 172. If the capture happened through the collusion of the master with the enemy, the loss may be laid by either cause, by capture or by barratry: *Arcangelo v. Thompson*, 2 Camp. 620; see, also, *Tomlinson v. Anderson*, 1 Taunt. 227; *Green v. Elmslie*, Peak. Rep. 212; *Hodgson v. Malcolm*, 2 N. R. 336. The amount of the loss should be stated. A partial loss may be given in evidence under an averment of total loss: *Gardiner v. Leassdale*, 2 Burr. 904; 1 W. Bl. R. 336. Any damage within the cause of action, as stated, may be given in evidence, without being specially averred as salvage, under an averment that the vessel sunk in the river: *Carey v. King*, Hardw. 304. When an adjustment has taken place, it need not be specially declared upon, but be given in evidence as admission, upon the usual declaration, or upon an account stated: *Rogers v. Naylor*, Park, 194; *Christian v. Coomber*, 2 Esp. Rep. 489; *Sheriff v. Potts*, 5 *ib.* 96; and see, further, Hughes on Insurance, 463 to 472.

*Plea.*] For the nature and use of the special pleas in these actions, see "*Assumpsit*," "*Debt*," and "*Covenant*." As to the Royal Exchange and the London Insurance Companies, it is enacted, by statute 11 G. 1, c. 30, s. 43, that they may plead generally, in actions of debt, that *they owed nothing*; in covenant, that they had not broke the covenants; and that

the jury should, thereupon, give such parts of the debt, or damages, as it should appear in evidence the plt. ought, in justice, to have. Under the general issue, in *assumpsit*, the deft. may avail himself of any matter of defence arising from the illegality of the insurance: the alteration of the policy after its execution,—non-compliance with some warranty or condition, express or implied,—the want of interest,—misrepresentations,—a deviation,—release, or a performance on his part, *Hughes*, 473; and this plea is usually alone sufficient, and comprehends all the ordinary subjects of defence. [Want of interest, since the statute of 3 & 4 Wil. IV. c. 42, and the rules of court ordered under it, must be specially pleaded: *Mills v. Campbell*, 2 Younge & C. 397. Unseaworthiness may be specially pleaded. In an action on a policy for a voyage during twelve months, and loss alleged by perils of the sea, plea, that after the making of the policy and during the time the ship was insured, she was greatly damaged, and unseaworthy, and that the plaintiff might, and could, and ought to have repaired her and rendered her seaworthy, but that well knowing the premises he neglected, &c., and that the ship continued in such unseaworthy state till the loss; held bad on demurrer, as not expressly showing that the plaintiff was aware of the unseaworthiness, and that there was time for repairing before the loss happened, or that the loss happened from such neglect; and, it seems, that no warranty of seaworthiness is to be implied, except at the commencement of the voyage: *Hollingworth v. Brodrick*, 7 Ad. & Ell, 40; and 2 Nev. & P. 608.] If the insured became an alien enemy after effecting the policy or bringing the action, this must be specially pleaded; if alien enemy before, it may be proved under the general issue: 3 Camp. 152; 15 East, 260; 8 T. R. 266; 6 T. R. 24. The plea of alien enemy will not be allowed to be pleaded with any other: *Treackenhod v. Payne*, 12 East, 206; 1 B. & P. 222. The Statute of Limitations cannot be pleaded when the loss accrued within six years before the commencement of the action; and, if a master barratrously carries the ship out of her course, and procures her to be condemned, sells, and delivers her up to the purchaser, it is only from this last event that the statute begins to run: *Hibbert v. Martin*, 1 Camp. 539. The bankruptcy of the deft., a tender, or the bankruptcy of the plt., occurring after the action brought, must be specially pleaded: *Page v. [596] Bouer*, 4 B. & A. 345; 7 T. R. 396; B. N. P. 153, v.; 3 \*Camp. 236. A set-off may be pleaded in case either of the parties become bankrupt; *post*, “*set-off*.” In other cases a set-off is not, in general, sustainable, as the demand upon a policy is for unliquidated damages: *Grant v. Royal Ex. Ass. Comp.* 5 M. & S. 439.

With respect to the pleadings in actions on policies of insurance *on lives*, and against *fire*, the observations already made will, for the most part, be applicable.

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#### *Precedents.*

See the various forms pointed out in 3 Chit. Pl. *Index*, tit. *Policy of Insurance*; also in 3 Went, 378, 380; 6 Moo. 199.

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#### *Evidence for Plaintiff.*

IN ACTION ON MARINE INSURANCE.] In this action the plt. has to prove,  
1. The policy; 2. The interest in the ship or goods; 3. The inception of

risk; 4. Compliance with warranties, and, where necessary, the license; 5. The loss and damages. But, if the action be in covenant or debt, on a policy under seal, the plt. will have to prove those facts only which are specially denied by the deft.'s pleas, except in an action against the two incorporated companies, when defts. need not plead specially: *ante*, 595, as to the effect of payment of money into court, see *post*, 601.

*Proof of the Policy.*] The policy must be produced, impressed with the proper stamp, and the deft.'s subscription proved. If subscribed by an agent, the handwriting and authority of that agent must be proved; and, if the authority was in writing, it should be produced. Proof that the agent has been in the habit of subscribing policies in deft.'s name, and with his knowledge, *Neale v. Irving*, 1 Esp. Rep. 61, or that deft. had been in the habit of paying losses upon policies so subscribed by the agent, *Houghton v. Ewbank*, 4 Camp. 88, is sufficient to establish his authority; and, in such cases, though the agent was appointed by a letter of attorney under seal, it need not be produced. But, where a witness proved the agent's handwriting, and that he had often seen him sign policies for the deft., but had not seen any general power of attorney from deft. to the agent, nor knew of any authority to sign the policy in question, nor was acquainted with any instance in which deft. had paid a loss upon a policy so subscribed, *Ld. Ellenborough* held that the proof of agency must be carried further: *Courteen v. Touse*, 1 Camp. 43. An averment that the policy was effected for the plts. by A., B., and C., is satisfied by proof that it was effected by the firm of A. and B., there being in fact two firms, which had two members in common: *Dickson v. Lodge*, 1 Stark. 226; *ante*, 594. Another policy between the same parties cannot be adduced to explain the one in question, *Robertson v. French*, 4 East, 132; but, as to the effect of a continuation-policy: see 16 East, 240. Nor is parol evidence admitted to control a policy; as, to prove that a voyage, stated in the policy to begin from Archangel, was to begin from the Downs, *Skin*, 54, 2 Salk. 444; or that a voyage from London to Berlin was to begin at an intermediate place: 5 Taunt. 462; or that a policy on ship or ships was not to extend to the ship: *Woolton*, 1 Taunt. 115, 1 Str. 309; or that a policy at and from A., on goods, was to extend to goods laden at a previous port: *Langham v. Hardy*, 4 Taunt. 628. But usage is admitted to explain the terms of a mercantile contract, though under seal, but not to add to, or vary, its stipulations: \**Gibbon* [\*597] *v. Young*, 8 Taunt. 261. Thus, usage may show that a warranty to sail with convoy is satisfied by sailing with convoy from the Downs, 2 Salk. 444; or that a port in Findland is, in mercantile language, a port in the Baltic: *Uhde v. Waters*, 3 Camp. 16; and see 1 Bing. 447. Witnesses to prove usage, must state facts, not their opinions: *Syers v. Bridge*, Doug. 527. Nor is usage admitted to contradict a policy; as, to show that a policy on a ship from A. to B., and until moored at anchor for twenty-four hours at B., was to continue till the goods on board were discharged: *Purkinson v. Collier*, Park. Ins. 416; 3 Camp. 57; B. N. P. 274; 8 Taunt. 92; 1 Gow, 74; 4 Taunt. 846; 4 Camp. 22. Representations by an agent, made at the time of effecting a policy, are evidence against his principal, as part of the *res gestæ*. But letters from the insured's agent abroad, containing an account of the transactions there, are not evidence against the principal: *Langhorn v. Alnut*, 4 Taunt. 511,

519; *Kahl v. Janson*, 4 *ib.* 565; *Reyner v. Pearson*, 4 *ib.* 662; *Betham v. Benson*, Gow's Rep. 45. A letter dated abroad, and addressed to J. S., in England, with the English ship-letter post-mark upon it, directing a policy to be effected, is sufficient to prove that J. S. was the person residing in Great Britain who received the order for, and effected the policy: *Arcangelo v. Thompson*, 2 Camp. 260; see further, Hughes, 478.

*Proof of Plaintiff's Interest in the Ship or Goods.*] The interest must be proved to have been in the persons named in the declaration: Hughes, 481; *ante*, 594. The interest in the ship is proved by acts of ownership, as loading the ship, paying the people employed, providing stores, and the like: *Amory v. Rogers*, 1 Esp. Rep. 207; *Thomas v. Fayle*, 5 Esp. Rep. 88; *ib.* 4 Taunt. 652. The ordinary mode of proof is to call the captain to state by whom he was employed; and, though he prove that the plt. claims under a bill of sale, possession is still sufficient evidence of property, till the contrary be shown, and the bill of sale need not be produced: *Robertson v. French*, 4 East, 130. The certificate of registry is not even *prima facie* evidence of ownership, *Pirie v. Anderson*, 4 Taunt. 652, 1 Stark. 180, *n.*, 2 Taunt. 5, 2 Camp. 170, *s. c.*; yet the certificate affords conclusive evidence that a person not named therein is not owner: *Marsh v. Robinson*, 4 Esp. Rep. 98; *Camden v. Anderson*, 5 T. R. 709; 6 Dow, 117. An averment that A. was sole owner of the ship to a certain day, is not disproved by evidence that he executed a bill of sale of part before that day, and that on that day the requisites of the registry acts were complied with: *Ritchin v. St. Barber*, 4 Taunt. 768; *vide* 6 G. 4, c. 110, s. 37, *et seq.* Nor is parol evidence of ownership, arising from possession at a certain period, disproved by showing a prior register, in the name of another person, and a subsequent register to that person: 4 East, 130. When the interest in the ship is claimed, in pursuance of a bill of sale, or other writing, and the insured do not rely upon possession, the ownership of the persons from whom the plt.'s claim must be proved, and the derivative title, viz. the bill of sale, or other document, accompanied with proof of registration: see 6 G. 4, c. 110, s. 43, and 4 Camp. 90, as to secondary evidence. The purchase of a ship in a foreign country has been proved by a copy of the bill of sale, issued by a public officer, whose duty was to record the original, and authenticate the copy: *Woodward v. Larking*, 3 Esp. Rep. 286; R. & M. 66; 6 Esp. Rep. 47; 1 Moo. 174. A letter from an agent, describing the ship, as his ship, is not conclusive, but is open to explanation: *Tulloch v. Boyd*, 1 Holt, 487. Evidence of value must also be given, except in case of a valued policy, where it is only necessary to prove some interest, to obviate the objection of an insurance without interest: 2 Burr. 1171. The interest in the goods may be proved, like the interest in the ship, by evidence of possession and acts of ownership. A bill of lading [\*598] is also frequently produced \*for this purpose. A bill of lading, directing the delivery of the goods to a consignee, is evidence of the interest in him; and, when made deliverable to the consignor, and indorsed by him, either specially or in blank, it is evidence of interest in the indorser or holder: *McAndrew v. Bell*, 1 Esp. Rep. 373; *Lichbourn v. Mason*, 2 T. R. 71. But, if the master qualify his acknowledgment by the words, "contents unknown," the bill of lading will not be evidence: *Haddow v. Parry*, 3 Taunt. 303. The signature of the master

must be proved, and also the indorsement of the party claiming under that. If the master be dead, proof of his death and handwriting is sufficient evidence of interest: *ib.* So, the master's handwriting is evidence of property, though he be alive, but not evidence of the shipment of the goods: 1 Stark. 226. By stat. 6 G. 4, c. 94, s. 2, any person (after 1st October, 1826,) intrusted with, and in possession of, any bill of lading, dock-warrant, &c., shall be deemed and taken to be the true owner of the goods, so as to give validity to any contract for the sale or pledge thereof, provided there be no notice by the documents themselves, that the person intrusted therewith is not the true owner: *Wright v. Campbell*, 4 Burr. 2047. A bill of lading, though a usual, is not a necessary document on the shipment of the goods; and, though it be unstamped, other evidence of the title is admissible: *Davis v. Reynolds*, 1 Stark. 115; 2 Stark. 277; 7 T. R. 241; 1 East. 58; 3 Esp. Rep. 213; 6 T. R. 45; 2 B. & P. 118. A copy of an official paper, containing an account of the cargo of a ship (the original having been made in pursuance of an act of Parliament by an officer of the Customs, and lodged there as an official document,) appears to be good proof that the property insured was put on board: *Johnson v. Ward*, 6 Esp. Rep. 47; 1 R. & M. 66. When the policy is on freight, evidence must be given that the right to freight had attached by reason of some goods having been put on board, or that there was an inception of the right to freight under the charter-party, or some other express or implied contract, 1 M. & S. 313. When it is averred that the interest is in a single person, and the policy on his account, and it is proved that the interest is in several, and the policy on their joint account, the variance is fatal: *Bell v. Ansley*, 16 East, 141; 1 Marsh. 41; 6 Taunt. 14. Where a policy stated the interest to be in A. B., who was interested at the time, and on whose account the policy was effected by another person, not the agent of A. B., it is sufficient to prove an adoption of the policy by A. B. after the loss: *Hagedorn v. Oliverson*, 2 M. & S. 485. A. lets his ship to freight and charter to B. for a voyage, the probable duration of which is eight months, at £100 per month; and, by the charter-party, B. is to make the advances for sailing charges on account of the money payable for the hire of the ship, misalled freight. B. insures £300 with C. for money advanced on sailing charges; and A. at the same time insures with C. £400 on freight. Upon a total loss, C. is not entitled to consider A.'s policy as effected on gross freight, and that, the amount being £800, A. is his own insurer for a moiety of the risk: *Etches v. Aldan*, 1 M. & R. 157. See further Hughes, 483.

*Proof of Inception of the Risk.*] In case of loss, there must be some evidence of the ship's sailing upon the voyage mentioned in the policy: *Roston v. Innes*, 1 R. & M. 336: Hughes, 484. This may probably be proved by some of the crew; or proof of a particular destination by charter-party would afford a presumption that she sailed on the chartered voyage; so, proof that she cleared out for a particular port, is evidence that she set sail for that port when she dropped from her moorings: *Cohen v. Hinckley*, 2 Camp. 52, 2 Ph. Ev. 56. Proof of a convoy-bond for a particular port, signed by the captain, coupled with the evidence of the custom-house officers, that a certificate, and other papers for such voyage, would, in the regular course of office, be delivered to the captain \*before he sailed, together with proof of the sailing, [\*599] has been held evidence of the ship having sailed on such

voyage: 2 Camp. 51. A license for the port mentioned in the policy is evidence to the effect: *Marshall v. Parker*, 2 Camp. 69. If the declaration aver that the ship sailed after the making of the policy, but in proof, she is found to have sailed before, the variance is not material: *Peppin v. Solomons*, 1 T. R. 469. The shipment of the goods is usually proved by the captain, and, if he be dead, the production of the bill of lading, and proof of his handwriting, will be evidence of the shipping, as well as of the interest: *Haddow v. Parry*, 3 Taunt. 305. But, where the bill of lading was offered in evidence, to prove that the goods were shipped on plt.'s account, *Ld. Ellenborough* rejected it, as being nothing more than the declaration of the captain: *Dickson v. Lodge*, 1 Stark. 226. So, the copy of an official paper, made in pursuance of an act of Parliament, by an officer of the Customs, containing an account of the cargo, and a report of the goods on hand, is evidence to prove the shipping: *Johnson v. Ward*, 6 Esp. Rep. 49; *Hughes*, 484.

*Proof of Compliance with Warranties.*] Where a policy contains a warranty, a strict and liberal compliance with it must be proved; and it is not sufficient to show something tantamount to a performance: *Pavson v. Watson*, Cowp. 785; 2 Saund. 200, c. (n.). To prove compliance with a warranty, that a ship was of a particular nation, proof of her carrying the flag of that nation when she was free from all danger of capture, and that the captain addressed himself to a consul of that nation in a foreign port, is *prima facie* evidence: *Arcangel v. Thompson*, 2 Camp. 262. When the warranty was to sail with convoy, compliance will be presumed, if convoy was required by law: *Thornton v. Lane*, 4 Camp. 231. The official letter of a commander of the convoy to the Admiralty at the end of the voyage, seems good evidence of the facts therein stated respecting the convoy: *Watson v. King*, 4 Camp. 275. The log-book of a ship of war seems, also, evidence of the time a ship under convoy sailed: *D'Israeli v. Jamete*, 1 Esp. Rep. 427; see, as to inspection of a log-book, *ante*, "Inspection." In a policy at and from Hamburg, the warranty that the ship was in port on a certain day antecedent, means in the port of Hamburg; and evidence that she was in any other port will not satisfy the warranty: *Colly v. Hunter*, 1 M. & S. 81. A warranty to *depart* before a certain day means to be out of port; a warranty to *sail* is satisfied by getting under weigh: *Alien v. R. A. Comp.* 3 M. & S. 461; 6 Taunt. 241; and see *Long v. Anderdon*, 3 B. & C. 495. There are also implied warranties, the breach of which will prevent the plt.'s recovering; as that the vessel is sea-worthy; but it is sufficient if she is sea-worthy at the time of sailing: *Annen v. Woodman*, 3 Taunt. 299. A ship is presumed to be sea-worthy, *Parker v. Potts*, 3 Dow, 31; but, where the inability of the ship to perform the voyage becomes evident soon after its commencement, the presumption is that the ship was not sea-worthy when she sailed: *Watson v. Clark*, 1 Dow. 344; *Douglass v. Scougaell*, 4 Dow. 269. There is also an implied warranty that the ship is equipped and manned in a proper manner for the voyage, *Law v. Hollingworth*, 7 T. R. 161, *Forsham v. Chabert*, 3 B. & B. 166, *Tait v. Levi*, 14 East, 481; but, if the crew were once sufficient, their negligence at the time of the loss is no breach; *Bush v. Ray*, 2 B. & A. 73. Ship-builders who have never seen the ship may state their opinion of sea-worthiness, on examining a survey taken by others: *Beckwith v.*

*Sydebotham*, 1 Camp. 117; *Thornton v. Ray, Ex. Ass. Co., Pea. Rep.* 26.

**Proof of License.]** When it is necessary to prove a license, the original document must be produced, if in existence; if proved to be lost, secondary evidence may be given: *Kensington v. Inglis*, 8 East, 273; *Brewster v. Sewell*, 3 B. & A. 296. The secondary evidence may be by an \*examined copy, if there be one, by parol testimony: 2 Atk. 71; 1 Esp. Rep. 409; 1 Camp. 192, 501; 1 Stark. 167. But, if the license be granted in this country, pursuant to the stat. 48 G. 3, c. 126, the next best evidence, in case of loss, is the register, or examined copies thereof, together with copies of the order in council, from the Secretary of State's office: *Rhind v. Wilkinson*, 2 Taunt. 237; *Eyre v. Palsgrave*, 2 Camp. 605. Proof that a vessel warranted to carry a French license remained at Bordeaux a month after the inspection of the document purporting to be a French license, and of other documents, by the officers of the French government, is *prima facie* evidence that the document is genuine: *Everth v. Tunno*, 1 Stark. 508. If the license be not granted to the plt., some evidence is necessary to connect him therewith; *Robison v. Morris*, 5 Taunt. 720; 1 Stark. 222; and see *Hagedom v. Reid*, 3 Camp. 379. But, with regard to goods prohibited to be exported without license, upon proof that they were entered for exportation at the Custom-House, it will be presumed that they were duly licensed: *Van Omerson v. Derwick*, 2 Camp. 44, see, further, *Hughes*, 485.

**Proof of Loss.]** The proof of loss must correspond with the averments in the declaration; and evidence of a loss of one nature cannot be given in evidence under a count upon the loss of another description; see *Hughes*, 487; *Kulen Kempt v. Vigne*, 1 T. R. 304. The captain's protest is not evidence, nor will the deft. be permitted to read it in evidence, though shown to him by the plt.'s agent, upon demanding payment: *Senet v. Porter*, 7 T. R. 158. A loss occasioned by the expense of salvage may be given in evidence, under a general allegation that the ship sunk, and the goods were spoiled, *Carey v. King*, Hardw. Rep. 304; but salvage payable under the decree of a court of Admiralty must be proved by regular evidence of the judgment of that court: *Thelluson v. Sheddon*, 2 N. R. 229. In case the ship is not heard of for a considerable time, her loss may be presumed: *Koster v. Innes*, 1 R. & M. 333; *Koster v. Reid*, 6 B. & C. 19. An entry in Lloyd's books, stating the capture is evidence of that fact against subscribers at Lloyd's, but is not notice, within the meaning of the clause, requiring payment within a certain time after notice: *Abel v. Potts*, 6 Esp. Rep. 242. The sentence of a foreign court of Admiralty is not evidence of capture; but after other proof of capture, it is evidence of the grounds of condemnation: *Marshal v. Parker*, 2 Camp. 69. A vessel driven on the enemy's coast, and then taken, is lost by capture: *Green v. Elmslie*, Pea. Rep. 202. Proof of capture by collusion will support an averment of loss either by capture or barratry: 2 Camp. 621. If, after capture, a ship is restored in a condition to pursue the voyage insured, and is afterwards lost on another voyage, it is not a loss by capture: *Kulen Kempt v. Vigne*, 1. T. R. 304. To support an averment that the ship, with the goods on board, was arrested by persons exercising the powers of government, and the goods detained, seized, and

confiscated, it is sufficient to show that the goods were forcibly taken from on board the ship by persons exercising the powers of government, without putting in any sentence of condemnation: *Carruthers v. Gray*, 3 Camp. 142; 15 East, 35. As to proof of the decree of a foreign court, see *ante*, 36. The copy of a sentence of condemnation of a foreign court is not made evidence for the underwriters, by being handed over to them by the insured as proof of loss: *Flindt v. Atkins*, 2 Camp. 215. Smuggling by the captain on his own account will be evidence of barratry, *Lockyer v. Offley*, 7 T. R. 252; but if, by the gross negligence of the owner, the mariners barratrously carry smuggled goods on board, the underwriters are not liable; *Pisson v. Cape*, 1 Camp. 434. Where prisoners of war rise, and confine all the crew except one, who is heard on deck conversing with them, it is evidence of barratry to go to the jury; *Hucks v. Thornton*, Holt, 20. Where the whole ship is let, the [\*601] freighter is owner *pro hoc vice*, and barratry may be committed by the general owner: *Vallys v. Wheeler*, Cowp. 143. It need not be proved that the master was not owner in cases of barratry, it lying upon the underwriters to prove that he was: *Ross v. Hunter*, 4 T. R. 99. It seems to be a loss by the perils of the sea, if one vessel run foul of another, *Buller v. Fisher*, 3 Esp. Rep. 67, or be run down through gross negligence, *Smith v. Scott*, 4 Taunt. 126, or be wrecked through the barratry of the master, *Heyman v. Parish*, 2 Camp. 149: or if a transport, insured for twelve months, be, in a dry harbour, damaged by taking ground at ebb tide, *Fletcher v. Inglis*, 2 B. & A. 315; or, if living cattle, warranted free from mortality, are killed by the rolling of the ship, *Lawrence v. Aberdeen*, 5 B. & A. 109; *Gabay v. Lloyd*, 3 B. & C. 793; 5 D. & R. 641. So, in an insurance on goods, if the ship be stranded and lost, but, while lying on the shoal, be seized, and the goods confiscated, *Hahn v. Corbett*, 2 Bing. 205; so where a portion of the goods was saved from the wreck, but never came to the hands of the owners, *Bondiet v. Hentig*, Holt, 149. But, where a ship was hove down for repairs on a beach within the tide-way, and, the tide rising, was bilged, it was held not a loss by the perils of the sea, *Thompson v. Whitmore*, 3 Taunt. 227, and see *Phillips v. Barber*, 5 B. & A. 161; neither where the destruction of a vessel is by worms at sea, *Rohl v. Parr*, 1 Esp. Rep. 445, nor where the ship is mistaken for an enemy, and sunk by the firing of another English ship, *Cullen v. Butler*, 5 M. & S. 461, are these losses by perils of the sea. A ship never heard of is presumed to have foundered at sea: *Green v. Brown*, 2 Str. 1199. It is sufficient if the ship has never been heard of in this country, without calling witnesses from the port of her destination: *Irvemlow v. Oswin*, 2 Camp. 85. In *Hautman v. Thornton*, Holt, 242, a ship which sailed on a seven-weeks' voyage, and had not been heard of for eight or nine months, was presumed to be lost. Proof that the ship was burned, to prevent her falling into the hands of the enemy, is a proof of loss by fire, *Gordon v. Rimmington*, 1 Camp. 623; so, if the ship be burned by the negligence of the master and mariners, *Bush v. Ray, Ex. As. Co.*, 2 B. & A. 72; but, if the goods be burned in consequence of being put on board in bad condition, it is not a loss by fire, *Boyd v. Dubois*, 3 Camp 133.

*Proof of Amount of Loss and Damage.*] A partial loss may be proved under a count for a total loss: 1 Camp. 557; 1 Taunt. 419. An adjust-



ment is proved by the signature of the under-writer, of his agent, and authority to subscribe a policy seems evidence of authority to sign an adjustment: *Richardson v. Anderson*, 1 Camp. 43, *n.* Salvage, upon re-capture, must be proved by producing the proceedings of the Admiralty Court, ascertaining the amount: *Thelluson v. Shedden*, 2 N. R. 229. In open policies, the assured must prove to the extent of his loss: but, in valued policies, if the loss be a total one, he need only show some interest; if partial, he must show the amount of loss, as in an open policy: 2 Saund. 201, *n.* stat. 19 G. 2, *c.* 37. The certificate of an agent of Lloyd's, resident abroad, is not admissible to prove the amount of the damage, though the deft. is a subscriber at Lloyd's: *Drake v. Marryatt*, 1 B. & C. 473; 2 D. & R. 696.

*Effect of Payment of money into Court.*] If money be payed into court generally, it is an admission of the policy stated in the special counts, and deft. may not show a subsequent alteration, though without his knowledge: *Andrews v. Palsgrave*, 9 East, 325; 2 T. R. 275, 288; 3 B. & P. 557; *Dye v. Ashton*, 1 B. & C. 3; 3 D. & R. 19. But, where the plt. had led the deft. to suppose the question to be tried was fraud, and allowed him to prepare his evidence accordingly, the Court of Common Pleas have refused to suffer the plt. to avail himself of payment of money into court as an admission: *Muller v. Hartshorne*, 3 B. & P. 566. Nor \*will such payment preclude the insurer from showing, in a po- [\*602] licy upon goods, from the loading thereof at A. that the goods were not laden at the place mentioned in the policy: *Mellish v. Allnut*, 2 M. & S. 106. Nor does it admit, beyond the sum paid in, as where a total loss is averred: *Ruchen v. Palsgrave*, 1 Taunt. 419; 1 Camp. 557. If a total loss and a stranding be averred the payment does not admit the various causes stated; but the plt. must still prove to which of them the loss was owing: *Everett v. Bell*, 7 Taunt. 450; 1 Moo. 158; *Stafford v. Clark*, 2 Bing. 377. The deft. is not precluded by such payment, from setting up the statute of Limitations, or the illegality of the contract, to bar the residue of the sum claimed: *Long v. Greville*, 3 B. & C. 10; 4 D. & R. 632; *Cox v. Parry*, 1 T. R. 464; *Ribbans v. Cricket*, 1 B. & P. 264, *post*.

*IN ACTION ON LIFE POLICY.*] The evidence in an action on a life policy will consist, in general, in proof of the policy, the interest of the insurer, the plt.'s right to sue, the compliance with the warranties and conditions on the policy, and the death of the person whose life was insured; but, on an action on a policy, under seal, as the deft. must, in general, plead all defences specially, plt. will have to prove only the issues raised by the pleas, except in actions against the two incorporated companies; *ante*, 595. As to effect of payment of money into court, see *ante*, 601.

*Proof of Policy.*] What has been already said as to the proof of the policy in actions on marine insurance will here apply: *ante*, 596.

*Proof of Interest and Right to Sue.*] The plt. must prove an interest in the life insured within the 14 G. 3, *c.* 48, *s.* 1, 3, & 4: as, that the plt. was a legal creditor, Park. 639, 640, 9 East, 344, 5 M. & S. 423; or a

trustee: Peak. Rep. 151. If the action be by the party to the policy, the plt.'s right to sue will be proved by the policy and other facts. If the action be by an assignee or executor, his title must be proved, as in other cases: see "*Bankrupt*," "*Executor*."

*Proof of Compliance with Warranties and Conditions.*] Evidence of this must be adduced according to the averments in the declaration. The conditions must be performed according to the terms used, and the apparent intent of the parties: and they are not satisfied by a performance *cy pres*: see *Want v. Blunt*, 12 East, 183; 3 Camp. 137; 4 T. R. 695. A warranty that a person is in good health, means that he is in a reasonable good state of health; it cannot mean that he is free from the seeds of disorder; and, though he may have laboured under a particular infirmity; yet, if it be proved by medical men, that it did not, in their judgment, contribute to his death, this warranty is complied with. Thus, the warranty of good health is complied with, though the party was subject to various fits of the gout, accompanied with spasms and convulsions, *Willis v. Poole*, Park, 650; and see *Ross v. Bradshaw*, 3 W. Bl. R. 12. And, if the disorder under which a party labours does not have a natural tendency to shorten life, it is no breach of the warranty, *Watson v. Manwaring*, 4 Taunt. 763; though, indeed, if particular questions be asked, which are not fairly answered, this avoids the policy, if material, though the death happened from another disorder, and the creditor, for whose benefit the policy was made, was in no wise privy to the fraud: *Watson v. Bevern*, 1 C. & P. R.; *Morrison v. Muspratt*, 3 Bing. 60. The statements of a wife made to an acquaintance, concerning her state of health, are good evidence to show her state of health: *Aveson v. Ld. Kinnaird*, 6 East, 188. A misrepresentation or concealment, does not, in general, invalidate a policy, unless a jury can find it to have been made with a fraudulent design; and, at all events, a concealment of an immaterial fact cannot invalidate it: see Hughes, 501; *Slackpole v. Simeon*, Park, 648; 6 Taunt. 186.

[\*603] \**Proof of Death.*] The death should be proved to have taken place within the period mentioned in the policy: see *ante*, "*Death*." When a question arises whether a loss took place within the time specified, this is to be determined by the jury, upon the evidence: Park, 644; 2 Salk. 625; 1 Ld. Raym. 480.

IN ACTION ON FIRE POLICY.] In this action, the plt. must prove, if raised by deft.'s pleas, (*ante*, 595,) the policy, plt.'s interest and title to sue, the compliance with the warranties as to description of property, &c., and conditions precedent; the loss within the limited time, the amount of such loss, the notice of such loss, and other subsequent acts, to entitle plt. to the sum insured. As to effect of payment of money into court, see *ante*, 601.

*Proof of Policy.*] What has been already said in actions on policies of marine insurance, will for the most part, here apply: *ante*, 596.

*Proof of Plaintiff's Interest and Title to sue.*] It is necessary to prove that the plt. was interested in the property insured: 14 G. 3, c. 48. An assignee of the policy cannot sue without the consent of the office or

underwriters, within the terms of the policy; therefore, such consent must be proved: see 4 B. P. C. 431; 2 Atk. 554.

*Proof of Compliance with Warranties, as to the Description of Property, &c., and Conditions Precedent.*] These must be strictly proved. A misrepresentation or concealment of material facts for the purpose of procuring an insurance to be effected at a low premium, will vitiate the policy. Where the plt. concealed the fact of fire having, just before entering into the policy, taken place close to the premises insured, and the fire broke out again, and consumed such premises, the policy was held void: 2 Marsh. R. 46; 6 Taunt. 338. A mis-description avoids the policy; as, if a building be described as of the first class instead of the second, where a higher premium would have been required for the second than the first: 3 Dow, 255. A substantial description of the property insured will suffice: 1 R. & M. 92. A coffee-house is not an inn: 4 Camp. 76. Where a policy was effected on stock in trade, household furniture, linen, wearing apparel, and plate, the party insured not being a linen-draper, this was held not to protect linen-drapery goods subsequently purchased on speculation; the word linen evidently meaning household linen, or linen used as apparel: *Watchorne v. Langford*, 3 Camp. 422. In a stipulation for a certain rate of premium for premises where no fire is kept, nor hazardous goods, deposited, this condition must be understood only as forbidding the habitual use of fire or the ordinary deposit of hazardous goods, not their occasional introduction for a purpose connected with the occupation of the premises: *Dobson v. Sotheby*, 1 R. & M. 90; Hughes, 507, 511. All the other proposals and conditions of the policy must be proved to have been strictly complied with: and a condition requiring the churchwarden, &c., to grant a certificate that the fire did not take place by fraud, &c., must be shown to have been fulfilled, even though the churchwarden, &c., wrongfully refuse to sign such certificate: *Worsley v. Wood*, 6 T. R. 110; 2 H. Bl. 254, 574, 577.

*Proof of Loss within the Time limited by Policy.*] The plt. must establish a loss by fire within the meaning of the policy. If the loss was attributable to some other cause than fire, as, from heat arising from the mismanagement of a register-stove, or the like, plt. cannot recover: *Austin v. Drew*, 6 Taunt. 436; 2 Marsh. 130; 4 Camp. 300; s. c. As to the meaning of the terms "usurped power," see 2 Wils. 363, Park, 657. \*The loss must be proved to have taken place within the [\*604] time limited by the policy; as to which, see 5 T. R. 695; 1 B. & P. 471, s. c.; 1 Dow, R. 263; Park. 661; Hughes, 508; 6 East, 571.

### *Evidence for Defendant.*

The matters of defence are numerous: as, evidence of misrepresentation, fraud, or undue concealment; of the illegality of the voyage, of the want interest, of the non-compliance with representations or with warranties: see *ante*, 595 to 604; Hughes, 490.

To assist the insurer in making his defence, it is enacted by the 19 G. 2, c. 37, s. 4, that, in all actions or suits brought by the assured upon any policy of insurance, the plt. or his attorney shall, within fifteen days after he shall be required so to do, in writing by the deft. or his attorney, declare in writing what sum or sums he had assured, or caused to be

assured, in the whole, and what sums he had borrowed at *respondentia* or *bottomry* for the voyage, or any part of the voyage in question, in such suit or action. And, in actions of this nature, a Judge will order the assured to produce, upon affidavit, for the inspection of the underwriters, all papers in possession of the former, relative to the matters in use: 1 Camp. 562: see *ante*, "Inspection."

*Fraud, Misrepresentation, and Concealment.*] When the assured conceals any material fact which relates to the ship, it will avoid the policy: *Carter v. Boehm*, 3 Burr. 1905. On a question respecting the materiality of concealment, it was held by *Gibbs, C. J.*, that the evidence of underwriters, who were called to give their opinion of the materiality of certain rumours, and the effect which they would have had upon the premium, ought not to be admitted; and he conceived it the province of the jury, and not of individual underwriters, to decide what facts ought to be communicated: *Durrell v. Bedesley*, 1 Holt. 283. In the case of *Berthan v. Longham*, 2 Stark. 258, a witness was examined as to whether particular facts, if disclosed to the underwriter, would, in his opinion, as a matter of judgment, make a difference as to the amount of the premium, though he was not allowed to depose as to what would be the probable course of his conduct in a particular case.

The assured is bound to communicate all the information he has received, though he is not certain of its truth, and it may afterwards turn out to be false: *Lynch v. Hamilton*, 3 Taunt. 37; see *ante*, 599, 602. The unseaworthiness of the vessel may afford a sufficient objection to the plt.'s claim; this should be proved by persons who have examined her condition; but experienced shipwrights may be called upon to say whether, upon the facts sworn to, she was, in their opinion, unseaworthy or not: *Beckwith v. Sydebotham*, 1 Camp. 117. It is sufficient if a representation be substantially performed, and it differs from a warranty, which must be strictly and literally complied with: *Pawson v. Watson*, Cowp. 785; *ante*, 599, 602. In actions on marine insurances, where the proceeding is against the second or subsequent underwriter, it is customary to admit evidence of representations to the first underwriter, as it will be presumed that credit was given to such representations by the subsequent underwriters: *Pawson v. Watson*, Cowp. 789; *Marsden v. Reid*, 3 East, 573. But the time and circumstances under which the communication was made, are to be taken into consideration: 1 M. & S. 9.

### *Competency of Witnesses.*

As to the competency of witnesses, it is to be determined by the situation of the parties on the record, and by the consideration whether the witness could gain or lose by the event of the trial and the verdict [\*605] in the cause. An underwriter is a competent witness for the deft. against another, though he has subscribed the same policy, because the witness could not receive either benefit or prejudice from the verdict in the action, *Bent v. Baker*, 3 T. R. 27, *Winter v. King*, 4 B. & A. 209, 1 Bing. 258, 5 B. & C. 388, 8 D. & R. 142; unless he has entered into the consolidation rule, or has paid the loss upon an agreement to be repaid in case the plt. fails: *Forrester v. Pym*. 1 M. & S. 14. The owner of a ship is incompetent, in an action on a policy on goods, to prove on behalf of the insured, that the ship was seaworthy,

*Prothero v. Elton*, Pea. Rep. 117, *Morish v. Forte*, 8 Taunt. 457, as he is interested in the result of the action; and, for the same reason, a master or part owner is incompetent: *De Symonds v. De La Cour*, 2 N. R. 374. The master cannot be examined, on the part of the underwriter, to disprove the commission of barratry, by showing that he acted with the owner's consent; for, if he were guilty of barratry, the underwriters would have a remedy over against him for the damages sustained: *Bird v. Thompson*, 1 Esp. Rep. 339. A release to the captain and rest of the crew of the vessel is sufficient in one stamp, and in the case of a joint tort, the captain's name standing first, and the release being first tendered to him: *Perry v. Bouchier*, 4 Camp. 80. The captain's protest is not admissible evidence of the facts there stated, but may be read, for the purpose of contradicting his testimony: *Henut v. Potter*, 7 T. R. 158.

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### INTEREST.

**FORM OF REMEDY FOR, AND PLEADINGS.]** Assumpsit lies to recover interest; 1 Chit. Pl. 88, Cro. El. 654; so does debt, when the interest is for the loan, or forbearance of money: 5 T. R. 553. It may, in general, be recovered under the common indebitatus count, 13 East, 98; but, in some cases, the plt. must declare specially: thus, in an action against the vendor of an estate, for not making a good title to, or conveying the same, if the purchaser proceed for interest and expenses, he must declare specially, stating such expenses, and the loss arising from not having the use of the deposit-money, 4 Esp. Rep. 223, 1 B. & P. 306, 3 Taunt. 157, 12 East, 419, 2 Bing. 4; but, if the jury give interest and expenses, the defect is cured: 2 Bing. 4.

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### Precedents.

#### INDEBITATUS COUNT FOR INTEREST.

(*The indebitatus count in assumpsit is as ante, 139; in debt, as ante, 406; inserting these words:*) For money before that time and then due and payable from the said deft. to the said plt., for interest upon and for the forbearance of divers large sums of money, before then due and owing from the said deft., to the said plt., and by the said plt. forborne to the said deft., for divers long spaces of time before then elapsed, at his like special instance and request. And, being so indebted, &c. (*The conclusion is as ante, 139, in assumpsit: and as ante, 406, in debt.*)

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### Evidence.

**When Recoverable.]** The general rule is, that the law does not imply a contract on the part of the debtor, to pay interest on the sum he owes, though the payment of the debt or principal may have been frequently demanded, 1 Camp. 50; but, after a considerable lapse of time, and repeated demands, and wrongfully withholding the debt, a jury may \*give interest, 3 Bing. 353; and interest is recoverable in [\*606] cases where the party has used the money, as where an agent pays the money of his principal into his banker's hands, and used it as his own: *Rogers v. Boehm*, 2 Esp. Rep. 702; 9 Moo. R. 28; 2 Bing. 4. In-

terest may be recovered whenever it appears, from the circumstances, that it was the intention of the parties that it should be paid, as where it can be shown that it was allowed on former balances of account, *Nichol v. Thomson*, 1 Camp. 52, n., or where it has been frequently charged and paid without objection, 15 East, 223, 3 Camp. 467; *Newell v. Jones*, 4 C. & P. 124. And even compound interest is allowed, when in conformity to the known and established course of dealing between the parties: 2 Camp. 486, n. 2, Moo. 206. Interest is recoverable on written securities; as where a bond, bill of exchange, or note, has been given, see those titles; it is not recoverable, however, on a foreign judgment, *Hillhouse v. Davis*, 1 M. & S. 173; or on a replevin-bond, *Anonymous*, 4 Taunt. 30; or on a recognizance of bail in the K. B.: *ib.* 722. And even on a bill or note, where the delay has been occasioned by plt., a jury may sometimes refuse it: *Du Bellois v. Waterpark*, 1 D. & R. 16. To entitle the plt. to interest on a bill, or note, the plt. should declare on it, and produce the instrument itself: *Fryer v. Brown*, R. & M. 145. And, where a bill or note is given for the price of goods, though they turn out void, yet interest will be allowed, as it will be inferred that such was the intention of the parties: 2 Burr. 1077; 15 East, 227. And so, where goods sold and delivered were to be paid for by a bill at a certain date, on which interest would have run: *Marshall v. Poole*, 13 East, 98. Money awarded to be paid on a particular day carries interest from that day, if duly demanded thereon: 3 Camp. 468. On a demand for goods, interest is not recoverable, though the price were to have been paid on a certain day, *Gordon v. Swan*, 12 East, 419, 13 *ib.* 99; nor on a balance struck on an account for goods sold, *Chalie v. Duke of York*, 6 Esp. Rep. 46; nor on a debt for money lent, *Calton v. Bragg*, 15 East, 223: or paid for the debt. *Carr v. Edwards*, 3 Stark. 132, or had and received by him, *De Barnales v. Fuller*, 2 Camp. 426; nor for work and labour: 1 H. Bl. 305; see 9 Price, 134. In some cases, damages in the nature of interest are recoverable: 9 Price, 134. Where, after the creditor has endeavoured to obtain payment, there has been a wrongful withholding a debt arising out of a contract which does not carry interest, the jury may allow interest in the shape of damages, for the unjust detention: 3 Bing. 353. Interest has been allowed in trover for a bill, though no mention of it has been made in the declaration: *Paine v. Pritchard*, 2 C. & P. 558.

*Amount of Interest, &c.*] The rate of interest allowed in this country is £5 per cent: 5 Ves. 803; Chit. B. 76. The general practice of the associates in taking damages, in cases where the debt carries interest, used to be to stop at the commencement of the action, see 2 Burr. 1085; but now it is carried down to the time when final judgment is signed: *ib.*, *Jarold v. Rowe*, 8 Taunt. 582; 3 Camp. 477. After a tender and wrongful refusal, interest sometimes ceases thereon: *Dent v. Dunn*, 3 Camp. 296. The interest is calculated from the time it was agreed to be paid. In some cases, it is payable from the date of a note, as, where it appeared on the face of it to be for money lent, Bayl. 158; or is payable with interest, *Kennerley v. Nash*, 1 Stark. 452; R. & M. 381, Chit. B. 422; in other cases, it is recoverable only from the time when the bill or note became due: 3 Ves. 134; 5 Ves. 803; 17 Ves. 27. On a note payable on demand it runs from the date: Chit. B. 422, &c. The drawer or indorser of a bill, or indorser of a note, is only liable from the time he receives notice of the

dishonour: 5 Taunt. 240; 1 Marsh. 36, *s. c.* If at the time a bill fall due, there be no person legally authorised to receive it, as, if the holder be dead, intestate, and administration be not taken out, [\*607] even the acceptor shall be charged with interest only from the time the administrator demands payment of the principal: *Murray v. H. I. Comp.* 5 B. & A. 204.

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INTOXICATION.—See DRUNKENNESS.

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INVOICE.—See *ante*, 329.

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IRELAND.—As to IRISH MARRIAGE, see *ante*, 397.—IRISH JUDGMENT, *ante*, 525.

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### JOINT STOCK COMPANIES.

[Joint stock Companies, and actions by and against them, are regulated by the statutes of 7 George 4th, & 1 & 2 Victoria. There is no distinction between trading and mining joint stock companies; and where a party takes shares in a concern, on a prospectus holding out that a certain capital is to be raised for carrying it on, he will not be liable as a partner unless the terms of the prospectus be fulfilled, or it be shown that he knows of and acquiesces in the directors' carrying it on with a less capital; where the jury negatived such knowledge or acquiescence, and found the defendant not liable, the court sustained their verdict: *Pitchford v. Davis*, 5 Mees. & W. 2.]

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JOINT TENANTS.—See PARTNERS, and *ante*, 462.

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### JUDGMENT, ACTION ON.

FORM OF REMEDY, AND PLEADINGS ON.] The peculiar remedy in an action on a judgment in the superior courts of this country, is by an action of debt. And it lies generally, or against an executor or administrator, suggesting a *devastavit*, 1 Saund. 216, 8, 9; and, though the judgment were erroneous, yet debt lies until it has been reversed: and the circumstance of the debt having been rendered makes no difference, unless the plt. has made his election, by charging the debt in execution: 1 Chit. Pl. 100: 6 Ves. 416. Debt at common law was the only remedy after a year and a day had elapsed from the time when the judgment was recovered, though *sci. fa.* is now sustainable: Gilb. Debt, 393. Debt on judgment is, however, only sustainable, where the judgment remains unsatisfied.

- It cannot be supported where the debt. has been in execution on the judgment, and discharged with the concurrence of the plt.; no action can be supported on the judgment, *Vigers v. Aldrich*, 4 Burr. 2482; 7 T. R. 420: "and the taking of the body in execution does not extinguish the debt,—it bars the remedy against the debtor," *p. Ld. Ellenb., Taylor v. Waters*, 5 M. & S. 103-4; and debt is not sustainable on the judgment, if debt. has been discharged under the Lords' Act. Debt also lies on the judgments of inferior courts of record, and that although the original action could not have been brought in the superior courts; it lies upon a judgment recovered in one of the courts of the city of London, by special custom: 1 Roll. Ab. 600. Debt also lies upon a judgment of nonsuit for costs in an inferior court.

Since 43 G. 3, c. 46, s. 4, which deprives the plt. of costs in an action on a judgment, unless the court, or one of the Judges, shall otherwise direct, actions on judgments are less frequently resorted to. 5 [\*608] Taunt. 264. \*The venue in this action should be laid in the county where the judgment was given, and not in the county where the original cause of action arose: *ib.* 196; Tidd. 1175; 5 East, 461. In pleading a judgment, it is unnecessary and improper to set forth all the proceedings in the cause; it should be shortly stated, that the plt., in ——— term, impleaded the debt. in the court of, &c., and that such proceedings were thereupon had; that afterwards, in ——— term, the plt., by the consideration of the said court, recovered his said debt: 1 Saund. 92, a. 2. And, in pleading the judgment of an inferior court, whether of record or not, it is unnecessary to set out the cause of action, or that debt. became indebted within the jurisdiction of the court; Cowp. 18; 2 Lev. 81; 1 Ld. Raym. 80. However, in debt, upon a judgment in the courts at Westminster, it is necessary to show with certainty the term and parties, and the sum recovered; and, where the judgment is in C. P., it is said that it is proper to state before what Judges it was recovered, Com. D. *Plead.* 2 W. 12; and this is frequently necessary in debt on a judgment in an inferior court; but the omission is aided by verdict; *ib.* Carth. 86. In setting out the judgment, attention must be paid to avoid a variance, as it will be fatal: 11 East, 546; 1 Moo. 19; *post*, "*Records.*" Where the judgment was on a bill of exchange, and obtained on only one of the counts, stating it to be concerning certain "promises and undertakings" in the plural number, would be a variance: Str. 892; 2 Stark. 7; B. N. P. 229. So if the names of the parties be misplaced, 7 Taunt. 271. Where there was a judgment for £388, Os. 1*d.* and debt was brought on it as for £388, recovered, omitting to state the penny, it was held to be a variance, and that it could not be cured by a remittitur of the penny, 2 Str. 1171; and so, where it was stated, in plea of judgment recovered, to be in an action on the case on promises to the damage of the debt., it was held bad on general demurrer: *Mill v. Pollor*, 7 Taunt. 271. In debt on judgment, as in other matters of record, the declaration should state a *prout patet per recordum*, Co. Lit. 303; a. 1 Ld. Raym. 35; 3 Salk. 565. However, the omission is only cause of special demurrer: 11 East, 565. Plt. usually alleges that the judgment remains in force, and that he has not obtained execution; but these allegations are not essential; 1 Saund. 330, n. 4.

The debt. cannot plead *nil debet*, because the judgment is conclusive evidence of the debt: Gilb. Debt. A plea of judgment is not good at common law, as such payment is matter in *pais*, and not of record; but,



where the whole of the judgment has been satisfied, the debtor may, by 4 Anne, c. 16, s. 12, plead judgment to actions on records; but, to come within the statute, he must have paid all the money due on the judgment, or the plea will be bad, 4 Moo. 165; but accord and satisfaction cannot be pleaded under this act: *ib.* Where there is no such judgment as the plt. hath declared on, the deft. must plead *nul tiel* record also, if there be a variance in the statement of it, Com. D. *Plead.* 2 W. 13, which issue is tried by producing the record itself: *post*, "*Records*." As it is a maxim in law, that there can be no averment in pleading against the validity of a record, though there may be against its operation, therefore no matter of defence can be pleaded which existed anterior to the recovery of the judgment, and the original deft. himself, or his bail or sureties, cannot plead that the judgment was obtained against him by fraud, *Moore v. Bowmaker*, 4 Taunt. 379, 2 Marsh. 392, s. c., though it may be pleaded, that a judgment against a third person was so obtained: *ib.* Chit. Pl. 427.

To a plea of *nul tiel* record, in debt on a judgment, the replication must state that there is such a record, and conclude *prout patet per recordum*, with a prayer that it may be inspected, &c.: Com. D. *Plead.* 2 W. 13.

### \*Precedents.

[\*609]

#### DECLARATION ON A FINAL JUDGMENT IN K. B. OR C. P. OR EXCHEQUER, IN ASSUMPSIT.

Middlesex (*local*) to wit. A. B. complains of C. D., (*Commencement in K. B. or C. P. as usual, in debt, ante*, "*Debt*," and proceed as follows:.) For that whereas the plt., heretofore, to wit, in — term, in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in the county of Middx. (*or, if in C. P., say*, "before the Rt. Hon. Sir William Draper Best, Knt., and his companions, then and still being his majesty's justices of the bench here, to wit, at Westminster, in the county of Middx." *or, if in the Exchequer, say*, "in the court of our said lord the king, before the barons of his Exchequer, at Westminster, in the county of Middx.") by the consideration and judgment of the said court, recovered against the said deft.\* the sum of £—, above demanded, which in and by the said court were then and there adjudged to the said plt. for his damages, which he had sustained, as well by reason of the non-performance by the said deft. of certain promises and undertakings, then lately made by the said deft. to the said plt., as for his costs and charges, by him about his suit in that behalf expended, whereof the said deft. was convicted, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself (*or, if in C. P., say*, "of the bench, aforesaid, at Westminster, aforesaid," *or, if in the Exchequer, say*, "of our lord the king, before the barons of his Exchequer, at Westminster, aforesaid," more fully appears; which said judgment still remains in full force and effect, not reversed paid off, satisfied, or otherwise vacated. And the said plt. hath not obtained any execution or satisfaction of or upon the said judgment so recovered, as aforesaid, whereby an action hath accrued to the said plt. to demand and have of and from the said deft. the sum of £—, above demanded. Yet, the said deft., although requested so to do, hath not yet paid the said plt. the said sum above demanded, or any part thereof, and the same still remains wholly due and unpaid. To the damage, &c. (*As ante*, 408; and insert damages sufficient to cover interest, &c.)

#### THE LIKE ON A JUDGMENT IN DEBT.

(*As in the last precedent, as far as, \* and then proceed as follows:*) As well a certain debt of £—, as also £—, which in and by the said court of our said lord the king, before the king himself (*or, if in C. P., "which in and by the said lord the king, of the bench,"*) were then and there adjudged to the said plt. for his damages, which he had sustained, as well by reason of the detention of the said debt as for his costs and charges, by him

about his suit in that behalf expended, whereof the said deft. was convicted, as by the record, &c. (*As in the last precedent to the end.*)

See other forms of debt on a verdict for deft. 2 Chit. Pl. 484; in assumpsit or debt on a Jamaica judgment, *ib.*, 243, 414; on an Irish judgment, *ib.*, 486; by conusee of an Irish judgment, *ib.*, 487; by *baron* and *feme* against *baron* and *feme*, administratrix, on judgment against intestate, revived by *scire facias*, suggesting devastavit, *ib.*, 484; on a Scotch decree, *ib.* 415.

PLEA OF NUL TIEL RECORD.

C. D. } And the said deft., by ———, his attorney, comes and defends the wrong  
 ats. } and injury, when, &c., and says that there is not any record of the said supposed  
 A. B. } recovery in the said declaration mentioned, remaining in our said court of our  
 said lord the king, before the king himself (*or, in C. P.*, “in the court of our said lord  
 the king, of the bench,”) in manner and form as the said plt. hath above in his said  
 declaration alleged, and this he, the said deft., is ready to verify; wherefore he prays  
 judgment if the said plt. ought to have and maintain his aforesaid action thereof against  
 him, the said deft., &c.

See other pleas of payment, &c., 3 Chit. Pl. 996; replications, stating record, &c., *ib.*, 1181-2.

[\*610]

\* *Evidence in.*

The evidence in an action on a judgment must necessarily depend on the plea pleaded. On *nul tiel record* pleaded, the plt. will only have to prove the judgment; as to which, see, fully, *post*, “*Record.*” A judgment, like other matters of record, may be proved, by giving in evidence an examined copy: *post*, “*Record.*” The judgment-book in the Court of Common Pleas is not evidence of a judgment therein entered, though the record have been made up, and the person interested in proving the judgment be no party to it: *Ayrey v. Davenport*, 2 N. R. 474. A judgment of the House of Lords may be proved by means of a copy of the minute-book of the House of Lords, for the minutes of the judgment are the solemn judgment itself: *Jones v. Randall*, Cowp. 17; 1 Stark. Ev. 245. To prove a verdict, an examined copy of the whole record, including the judgment, must be given in evidence, B. N. P. 334; for otherwise it would not appear but that judgment had been arrested, or a new trial granted: *ib.* 1 Str. 162. This is not, however, applicable in the case of a verdict on an issue out of Chancery, as it is not usual to enter up judgment in such a case, and the decree of the Court of Chancery is equally proof that the verdict was conclusive: *ib.* If it be required merely to prove what was had between the parties, Barnes, 449, or the amount of damages given, the *nisi prius* record, with the *postea* indorsed on it, and regularly stamped and marked, is sufficient evidence for that purpose: *Foster v. Compton*, 2 Stark. 364.

JUDGMENT RECOVERED, DEFENCE OF.

PLEADINGS AS TO.] A judgment before recovered by the plt. for the same cause, may be given in evidence in assumpsit under the general issue, 2 Str. 733, 1 Saund. 92, *n.*; and so it may be in debt on a simple

contract, trespass, or case, &c., 1 Chit. Pl. 492; but, in debt on a specialty, or record, or in covenant, it must be pleaded specially; and it is, in general, best to plead it specially, as it does not otherwise operate as an estoppel: *Outram v. Morewood*, 3 East, 365; *Stafford v. Clark*, 2 Bing. 381; *Vooght v. Winch*, 2 B. & A. 662. We have already seen how to state the judgment: *ante*, 608. The usual replication to a plea of judgment recovered, is *nul tiel record*, under which plt. may dispute the obtaining the judgment, or take advantage of a variance; as to which see *ante*, 608. If there was a judgment really recovered in assumpsit, the plt. may now assign that his action is for the breach of different promises, see 3 Chit. Pl. 1213; or reply that the promises, &c., were not the same: 6 T. R. 607; 3 B. & C. 235. If the deft. plead a judgment recovered in an inferior court, not stating that the contract arose within the jurisdiction of that court, the plt. may reply that the cause of action arose out of the jurisdiction: *Briscoe v. Stephens*, 2 Bing. 213.

### Precedents.

#### PLEA OF JUDGMENT RECOVERED IN E. R., C. P., OR EXCHEQUER.

(*Actio non, as post, "Pleas."*) Because he saith that the said plt., heretofore, to wit, in ———— Term, in the ———— year of the reign of our said lord the king, in the court of our said lord the king, before the king himself, the same court then and still being holden at Westminster, in the county of Middlesex (or, if the plea be of a judgment recovered in the C. P., say, "before Sir William Draper Beut, Knight, and his companions, then his majesty's justices of the bench at Westminster, in the county of Middlesex," or, if in the Exchequer, say, "before the barons of his majesty's Court of Exchequer, at Westminster, in the county of Middlesex,") impleaded the said deft. in a certain plea of trespass on the case on promise, to the "damage of the said plt. [*\*611*] of £—, for the not performing the very same identical promises and undertakings in the said declaration mentioned; and such proceedings were thereupon had in the said court in that plea, that afterwards, to wit, in that same ———— term, the said plt., by the consideration and judgment of the said court, recovered in the said plea against the said deft. £— for his damages, which he had sustained, as well on occasion of the not performing the same identical promises and undertakings in the said declaration mentioned, as for his costs and charges by him about his suit in that behalf expended, whereas the said deft. was convicted (as to form of judgment in debt, *ante*, 608-9.) as by the record and proceedings thereof still remaining in the said court of our said lord the king, before the king himself (or, if in C. P., "of the Bench aforesaid," or, in the Exchequer, "of the Exchequer aforesaid,") at Westminster aforesaid, more fully and at large appears; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this, &c. (Conclude with a verification by the record, *post*, "Pleas.")

See other pleas of judgment of *retraxit* recovered, &c., 3 Chit. Pl. 930.

#### REPLICATION OF NUL TIEL RECORD, IN PLEA OF JUDGMENT RECOVERED IN SAME COURT.

(*Precludi non, as post, "Replication."*) Because he saith that there is not any record of the said supposed recovery in the said plea mentioned, remaining in the said court of our said lord the king, before the king himself (or, in C. P., of the Bench aforesaid,") at Westminster aforesaid, in manner and form as the said deft. hath above in his said plea alleged, and this he, the said plt. is ready to verify, when, where, and in such manner, as the court here shall order, direct, or appoint; and, because the court of our said lord the king now here (or, in C. P., "before the justices of the bench") will advise themselves upon the inspection and examination of the said record, by the said deft. in his said plea alleged, a day is given to the parties aforesaid, before our said lord the king (or, in C. P., "before the justices of the bench,") at Westminster aforesaid, until ———— next after

— (or, by original, "until —, wheresoever, &c., or, in C. P., "until —," to hear the judgment of the said court thereupon; for that the said court of our said lord the king now here are not yet advised thereof, &c.

**EFFECT OF JUDGMENTS in Superior Courts with respect to Parties to Judgment.]** Transactions between two parties in a suit are not binding upon a third; and, therefore the judgment of a court on facts found, although evidence against the parties, and all claiming under them, will not be generally admissible against strangers: *D. of Kingston's case*, 20 St. T. 538; see *ante*, 40. And, in order to bind the party to a judgment, he must have sued or been sued in the same character in both suits. Thus, in an action by an executor on a bond, he will not be estopped by a judgment in an action brought by him: 5 Rep. 32, a. When a judgment has already been obtained by the plt. against the deft. for a demand, the simple contract, or other obligation, upon which such demand accrued, is merged by the superiority of such judgment: *transit in rem judicatam*. And, if the plt. sue on the original promise, deft. may plead the judgment in bar: 3 Chit. Pl. 929. Where the party gives a collateral and concurrent security, which in itself would not operate as an extinguishment of the original demand, it cannot operate as such by being pursued to judgment: 3 East, 251.

*Privies* are similarly situated as those to whom they are privy, whether they be privies by estate or in law: *ante*, 40. A judgment against an ancestor will be evidence in an action against his heir: *Locke v. Norborne*, 3 Mod. 141; *Outram v. Morewood*, 3 East, 355. Where several remainders are limited by the same deed, a verdict for one in remainder may be evidence for the next in remainder, *Pyke v. Crouch*, 1 Ld. Raym. 730, B. N. P. 232; and a verdict, for or against a lessee, will be evidence in like manner as to him in reversion: Com. Dig. Ev. A. 5; B. N. P. [\*612] 232; 1 Ph. Ev. 308. \*A representative will be bound by a verdict against his testator or intestate, *Rex v. Hedden*, And. 389; and the judgment against a schoolmaster of an hospital has been held to be evidence against his successor, when the point in issue concerned the rights of his office: *Travis v. Chaloner*, 3 Gwill. 1237. On a *quo warranto* against deft., as bailiff, where here he made title under the bailiffship of two parties, a record of a judgment of ouster against them was admitted as evidence: *Rex v. Hedden*, 2 Str. 1109; B. N. P. 231; *Rex v. Grimes*, 5 Burr. 2601.

**Effect of Judgments as respects Strangers.]** There are exceptions to the general rule that judgments bind only parties or privies. Thus, in the case of customs or tolls, verdicts, whether recent or ancient, respecting the same custom or toll, are admissible when other parties are concerned; Carth. 181; B. N. P. 233. So, in the case of customary commoners, *ante*, 370; and thus, a verdict with regard to a public right of way is evidence for or against another claiming in the same right: *Reed v. Jackson*, 1 East, 357. The verdict, however, in such case is not conclusive: *Biddulph v. Ather*, 2 Wils. 23. The judgment in remainder is in the same manner conclusive: *ante*, 311. Where a judgment is offered in evidence, merely for the purpose of proving the fact that such judgment has been obtained, and not with a view to prove the facts upon which the judgment

was founded, it may be evidence for or against a stranger. Thus, a verdict against a master, in an action for the negligence of his servant, is evidence, in an action by the master against the servant, to prove the amount of damages: *Green v. New River Comp.*, 4 T. R. 590. A recovery against one of several parties to a joint tort, frequently precludes the plt. from proceeding against any other party not included in such action: *Cro. J.* 74; *Yelv.* 68; *B. N. P.* 20. But, where the evidence and the damages in the two actions might be different, as where two persons on different occasions, have published the same libel, separate actions may be supported against each, 2 B. & P. 69: and the recovery against one party in an action for criminal conversation is no bar to an action against another party for a similar injury: 1 Camp. 415. In an action for debt on the statute for fishing in plt.'s fishery, a judgment in an action of trespass against a different party by the same plt. was allowed in evidence, the defts. in the two actions being both servants, and acting under the authority of a third party, one of whom, in the action of trespass, had justified as his servant, *Kinnersley v. Orpe*, 2 Doug. 517; but see *Outram v. Morewood*, 3 East, 366, where such a judgment was held not to be conclusive; where, however, it was also held, an action against husband and wife was sufficiently barred by a judgment in a former action on the same point, in which the wife was deft.; *ib.* The effect of a judgment will be the same, though one only of the defts. in the suit was a party in the former action; as, where a question of right of water has been tried, the record of that trial was held to be evidence in a second action against the same deft. joined with others, if they all claim under him: *Strutt v. Barrington*, 5 Esp. Rep. 58; see further; *ante*, 39 to 41.

*Effect of Judgments as to Subject-matter of the Suit.*] Where the cause of action is the same, a judgment between the same parties is binding on each, and it is immaterial that the form of action is different, if the cause of action be the same: *Hitchin v. Campbell*, 5 W. Bl. R. 827. Thus, a judgment in debt is a bar in an action of assumpsit, on the same contract: 4 Rep. 94. So, a judgment in trespass, in which the right of property is determined, is a bar in trover for the same taking: *Com. D. Action. K.* 3. Where the party mistakes his form of action, and thereby fails, he will not be concluded in such case by the judgment: *Ferrars v. Arden*, *Cro. El.* 668; 2 Saund. 47, *p. (n.)*; *Godson v. Smith*, 2 Moo. 157. Where, in a second action, the declaration is framed in such a manner, that the causes of action may be \*the same as those in [\*613] the first suit, the party who brings the second action is bound to show that they are different: *Ld. Bagot v. Williams*, 3 B. & C. 239; 5 D. & R. 87.

But a judgment is merely evidence where it is directly upon the point in question, and is not evidence of any matter which comes collaterally in question, nor of any matter incidentally cognizable, nor of matter of inference: 1 Salk. 290; *D. of Kingston's case*, 20 How. St. Tr. 533; see *ante*, 41.

*PROOF OF A JUDGMENT RECOVERED.*] Under a plea of judgment recovered, the deft. must give in evidence an examined copy of the judgment in the first action, *ante*, 620, and *post*, "Record;" and he must then proceed to show that the cause of action was the same. This may

be done by calling persons as witnesses who were present at the first trial and heard the evidence given at the second trial, *Hitchin v. Campbell*, 8 Wils. 240, 2 W. Bl. R. 827, *s. c.*; also, by producing and proving the particulars of demand, if any: see *post*, "*Particulars of Demand*."

JUDICIAL DOCUMENTS.—See RECORD;—JUDGMENT;—VERDICT;—WRIT;—RULE OF COURT.

JURISDICTION.—Pleas to, *ante*, 1.

## JUSTICES OF PEACE, ACTIONS AGAINST.

FORM OF REMEDY, AND WHEN LIABLE, 613.

FORM OF PLEADINGS, 614.

EVIDENCE FOR PLAINTIFF IN GENERAL, *ib.*—*Notice of Action, when necessary*, 615.—*Service of Form of Notice, ib.*—*Commencement of Action within due Time*, 616.—*Malice and Want of probable Cause, where Conviction has been quashed*, 617.

EVIDENCE FOR DEFENDANT IN GENERAL, *ib.*—*Tender of Amends*, 618.

FORM OF REMEDY, AND WHEN LIABLE.] In general, no action can be supported against a judge or justice of the peace, acting *judicially*, and who has not *exceeded his jurisdiction*, however erroneous his decision or malicious his motive, 1 Salk. 306, 2 T. R. 225, 5 *ib.* 186, 1 Ld. Raym. 466, 6 T. R. 449, 3 M. & S. 325; and no action lies, although the magistrate was not duly qualified to act: 3 B. & A. 266. And, before any action can be brought against a justice of the peace for any thing done in the discharge of his duty, it must be proved that his attention was called to all the facts necessary to enable him to form a judgment as to the course he ought to have pursued: 3 Bing. 85; 8 East, 113. [\*614] And, in \*8 East, 113, it was held that magistrates would not be affected as trespassers, if facts stated to them on oath, by a complainant, were such whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement. In general, however, where there has been an excess of jurisdiction, trespass may be supported for any thing done thereunder; and, therefore, where a justice of the peace maliciously and irregularly granted a warrant to apprehend a person for felony, without any information on oath, it was held, that the party had a remedy against the justice, by action of trespass: *Morgan v. Hughes*, 2 T. R. 225; 2 Chit. R. 304; 1 D. & R. 97. An action for false imprisonment lies against a justice who imprisons a party on a conviction

founded on a commitment differing therefrom in stating the offence: *Rogers v. Jones*, 3 B. & C. 409; 5 D. & R. 484. And, when the justice has no jurisdiction over the subject-matter, trespass or trover, where goods have been taken, is the proper form of remedy against him: *Hard.* 483; 1 B. & B. 432; see *post*, "*Trespass*." If a justice improperly refuse to act when he should do so, an action on the case for a nonfeasance lies against him: 3 B. & P. 551; 1 Leon. 323; *Cro. El.* 196; 3 Wils. 342.

**FORM OF PLEADINGS.]** There is nothing, in general, peculiar relating to the form of the pleadings in actions against justices. With respect to the *venue*, by 21 J. 1, c. 1, s. 5, it is enacted, "that if any action shall be brought against any justice of the peace, mayor, or bailiff, of a city or town corporate, headborough, port-reeve, constable, &c., or any of them, or any other, which in their aid or assistance, or by their commandment, shall do any thing touching or concerning his or their office or offices, for or concerning any master, cause or thing, by them, or any of them, *by virtue or reason* of their, or any of *their office or offices*, that the said action shall be laid within the county where the trespass or fact was done and committed, and not elsewhere."

In actions against a magistrate for acts done under a quashed conviction, it must be averred, that such acts were done maliciously, and without probable cause, or *plt.* will not get more than 2*d.* damages: *post*, 617.

By 21 J. 1, c. 12, s. 5, against justices, for any thing done by them by virtue or reason of their office, the general issue may be pleaded, and the special matter given in evidence.

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### *Precedents.*

See plea of tender of amends by a justice of the peace, 3 Chit. Pl. 1065.

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### *Evidence for Plaintiff.*

**In General.]** We have already seen as to when an action lies, or not, against a justice of the peace, and the *plt.*'s evidence must be formed accordingly, and according to the cause of action stated in the notice of action. Independently of the cause of action, it is also necessary to prove such notice of action, and the service thereof, the time of the commencement of the action, and that it is within the time limited, and that the act complained of took place within the county laid in the declaration. It must also be proved, in an action against a magistrate, for an act done under a quashed conviction, that he acted maliciously, and with the want of a probable cause, or *plt.* will get only 2*d.* damages: see *post*, 617.

Where there is an imprisonment under a justice's warrant, in order to connect the justice with the act, *plt.* should serve a notice on the *def.* to produce the warrant, if the warrant be in his possession, so as

to enable the plt. to give secondary evidence of its contents. But, where the warrant remains in the hands of the officer, the latter must be served with a subpoena *duces tecum*. The connexion between the justice and the officer \*may likewise be proved, [\*615] by showing that the former has recognized the acts of the latter.

*Notice, when necessary to prove it.]* By 24 G. 2, c. 44, s. 1, it is enacted, that, "No writ shall be sued against, nor any copy of any process, at the suit of a subject, shall be served on any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent of the party who intends to sue, or cause the same to be sued or served, *at least one calendar month* before the suing-out or serving the same, in which notice shall be clearly and explicitly contained the *cause of action* which such party hath, or claimeth to have, against such justice of the peace: on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode; who shall be entitled to have the fee of 20s. for the preparing and serving notice, and no more."

It is necessary to prove this notice in all cases where a justice of the peace acted in the character of a magistrate, though erroneously, and though he *exceed his jurisdiction*, *Prestridge v. Woodman*, 1 D. & R. Mag. Rep. 502, 1 B. & C. 12, s. c., and even when not in the regular execution of his office, if he conceived himself to be so, 9 East, 364, 3 Camp. 342, 3 M. & S. 530, 2 Price, 126, 2 Chit. R. 459; and, where a lord of the manor, being a justice of the peace, took away an unqualified person's gun, he was presumed to have acted *quasi* a justice of the peace, 2 H. Bl. 114; and so, if a justice of the peace acts *alone* in a case where *two* ought to act, 2 Camp. 199, n., *Wheeler v. Tate*, 9 East, 364; as he intended to act as a magistrate at the time, however erroneously: *ib.* And, where a justice does an act under the colour of his office, though he exceed his jurisdiction, he is entitled to notice before action brought: 1 B. & C. 12; 2 D. & R. 43, s. c. But, if the act complained of has not been done in the capacity of a justice, notice is not requisite. And thus, where a justice took a fee for granting a license to a publican, it was held that such fee could not have been taken by him in the character of justice, and that he was not within the benefit of the act, though he had been in the habit of taking a fee for many years: *Morgan v. Palmer*, 2 B. & C. 729; 4 D. & R. 283. And no notice is necessary in an action for the penalty given by 18 G. 2, c. 10, for acting as a justice of the peace without a proper qualification: *Wright v. Norton*, Holt, C. 458.

*Notice, Service of.]* It must be shown that a copy, or *duplicate original*, of the requisite notice of action "has been delivered to him, or left at the usual place of his abode," by the attorney, or his agent, *who* served it, and the justice of the peace *should have* notice to produce the original, if there is no duplicate, at the trial; and it will be necessary for the party to prove the precise day on which he served such duplicate original.

*Notice, Form of.]* A defect in the notice will be a fatal ground of non-suit on the trial, as no cause of action not therein expressed can be given in evidence: 1 Esp. Rep. 358. As to the requisites of the notice: 1st. It must be in writing, and express the nature of the writ or process



intended to be sued out, as well as the cause of action: if, therefore, notice of an action on the case for false imprisonment be given, and trespass for an assault be afterwards brought, it will be fatal: *Lovelace v. Currie*, 7 T. R. 631; *Strickland v. Ward*, *ib.*, n. 2d. It must be indorsed with the Christian and surname of plt.'s attorney, and his place of abode; but the attorney need not set out his Christian name at length, his initials will be sufficient, as "T. & W. A. Williams;" *James v. Swift*, 4 B. & C. 681: 6 D. & R. 625; *Mayhew v. Locke*, 7 Taunt. 63. As to the abode, it is sufficient for the attorney to describe himself of such a place, as "of \*Birmingham," *Osborn v. Gough*, 3 B. & P. 550; but it was [\*616] said by Thompson, B., that to say of London, Manchester, or such other large town, would be insufficient, *Cooke v. Currie*, Tidd, 28, n.; and it is bad to say, "given under my hand at Durham," as it does not indicate that his place of abode is there, 7 T. R. 635; it must not be vague or incorrect, as where he is described of "New Inn London," instead of Westminster, it being, in fact, in that place: *Stears v. Smith*, 6 Esp. Rep. 138. Where the attorney's name and place of abode is stated in the body, instead of the back of the notice, it is immaterial: *Cooke v. Curry*, Tidd, 27, n. It appears not to be essential that the notice should specify the form of action, but that it is sufficient if it state the writ and process, and the cause of action: *Jabin v. De Burgh*, 2 Camp. 196; *Strickland v. Ward*, 7 T. R. 631, 3, n. And, where the notice stated that a *latitat* would be issued against the deft. "for the said imprisonment and sum of money," and the declaration was for assault, and battery, and imprisonment, the notice was held good, being sufficient to apprise the magistrate of the nature of the action about to be brought against him so as to enable him to tender amends; and that the only effect which the omission of any mention of battery in the notice could produce, would be to exclude evidence of a battery at the trial: *Robson v. Spearman*, 3 B. & A. 493. The notice must state substantially the ground of complaint, but it need not state the mode or manner in which the injury has been sustained: *Jones v. Bird*, 5 B. & A. 844. In an action against two justices of the peace, for illegally convicting the plt., and issuing a warrant of distress, against his goods, the notice of action stated the warrant to be directed to A. B., and, when produced at the trial, it was found to have been directed to C. D., constable of U.; it was held to be a fatal variance, although A. B. executed the warrant: *Aked v. Stocks*, 1 M. & P. 346. Nor will the notice be defective, though it is drawn up in the form of a declaration, if otherwise sufficient: *Brown v. Tanner*, McCl. & Y. 469.

Where the action is brought against a magistrate, under 43 G. 3, c. 141, under a conviction that has been quashed, the notice must state that it was done maliciously.

*Proof of Commencement of Action.*] By 24 G. 2, c. 44, s. 8, it is enacted, that "No action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer, or person acting *as aforesaid*, unless commenced within six calendar months after the act committed." It will, therefore, be incumbent on the plt. to show that his action has been commenced within the time above prescribed. The six months are to be calculated inclusive of the day of committing the act: *Clarke v. Davey*, 4 Moo. 465. Where there is a continuing imprisonment, a justice is liable

to answer for such part of it, suffered under his warrant, as was within six calendar months before action commenced: *Mussey v. Johnson*, 12 East, 67; and *post* "Officer." It must be shown the action was not commenced within the month after notice given; *ante*, 162. The time begins on the day on which the notice is given: 3 T. R. 623. As to proof of commencement of action, see *ante*, 162.

The suing-out the process, whether by bill of Middlesex, *latitat*, or otherwise, is the commencement of the action, Willes, 257, 2 Bl. R. 925, Burr. 964; and, by producing the writ at the trial, it will obviate any dispute as to its commencement. Where no *alias* has been sued out, it is sufficient to prove the first writ, without proving the return, provided the plt. has proceeded on it, and declared within a year, 7 T. R. 7; but, where an *alias* is given in evidence, and it is necessary, in order to save the time, to show that the second writ is a continuation (2 B. & P. 157) of the first, it must be shown that the *first* was returned, as the suing-out the second writ is *prima facie* evidence that the first has *not been* [\*617] *returned*, 14 East, 493; the \*party must therefore, have the writ and *alias* at the trial, and prove the first to have been returned, either by the production of the writ itself, or an examined copy: 6 T. R. 617. When it is material to distinguish the day the writ was taken out, the fact may be proved, in opposition to the teste: 2 Burr. 962.

*Proof that Cause of Action accrued in County where the Venue is laid.*] This must be established as required by 21 J. 1, as *ante*, 614, which may be done by calling parties well acquainted with the place and county.

*Proof of Malice where Action is brought after Conviction quashed.*] By 43 G. 3, c. 141, s. 1, "in all actions against any justice, &c., on account of any conviction by him, &c., made for levying any penalty, apprehending any party, or for the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plt. in such action, besides the value and amount of the penalty or penalties which may have been made, shall not be entitled to recover any more or greater damages than the sum of twopence nor any cost of suit whatever, unless it shall be expressly alleged in the declaration, in the action wherein the recovery shall be had, and which shall be in an action on the case only, that such acts were done maliciously, and without any reasonable and probable cause." And by s. 2, "that such plt. shall not be entitled to recover against such justice any penalty which shall have been levied, nor any damages or costs whatever, in case such justice shall prove, at the trial, that such plt. was guilty of the offence whereof he had been convicted, or had been apprehended, or otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence." It is not sufficient for the plt. to show, under this act, that he was innocent of the offence of which he was convicted, but he must also prove, from what passed before the magistrate, that there was malice and a want of probable cause: *Burley v. Bethune*, 5 Taunt. 583; 1 Marsh. 220. As to proof of malice, *post*, "Malicious Arrest." This statute extends only to those cases where the conviction has been quashed: *ante supra*. And in an action against a magistrate for false imprisonment, the plt. proved a commitment for a certain alleged offence, the deft. proved a conviction of

the plt. for an offence different from that recited in the commitment; it was held that this conviction was no justification of the imprisonment. The deft., in order to deprive plt. of his costs under 43 G. 3, c. 141, tendered evidence to show that the offence mentioned in the conviction had actually been committed by the plt.; it was held, however, that that statute applied only to cases where convictions had been quashed; and, therefore, that the evidence was not admissible for that purpose: *Rogers v. Jones*, 3 B. & C. 409. This statute does not extend to protect justices in the execution of their office, against actions for acts of trespass or imprisonment, unless done on account of some conviction made by them of the plts. in such actions, by virtue of any statute: 12 East, 67. It also seems that, if a conviction be good upon the face of it, the production and proof of it at the trial will justify the convicting magistrate under the general issue, in an action of trespass, as well as in respect of such facts stated therein as are necessary to give them jurisdiction, as upon the merits of the question: 16 East, 31; 3 Moo. 294.

### *Evidence for Defendant.*

We have already seen as to when a justice of the peace is liable; and deft. should be prepared to rebut the plt.'s proof accordingly.

*When protected by Evidence of Conviction.*] Where there is a subsisting\* conviction, and the deft. has been convicted under [\*618] a statute, before the deft. as a justice, and the punishment is imprisonment, and production of that conviction is sufficient evidence for such justice, when good on the face of it, *Gray v. Cookson*, 16 East, 13; or whether the action be for imprisoning the plt., under 5 G. 4, c. 18, for not paying a penalty given by statute: *Britton v. Kinnard*, 1 B. & B. 432; ante, 382. Where, however, the subject-matter of the conviction is not within the justice's jurisdiction, the conviction will afford him no defence, as it is void: *Crepps v. Durden*, Cowp. 640; 16 East, 21. Thus, where the deft. had convicted the plt. in destroying game, and though the plt. had effects sufficient to answer the penalty, which might have been distrained, yet he sent him to Bridewell, it was held that trespass could be supported, and that the conviction could not avail deft.: *Hill v. Bateman*, 2 Str. 710. And, where the commitment made in pursuance of an adjudication, as well as the adjudication in respect to the imprisonment of the plt., was an excess of jurisdiction, and the imprisonment thereunder a trespass, it was held that the justices were liable, although the conviction had not been quashed: *Groome v. Forrester*, 5 M. & S. 314. Where, in trespass against two magistrates, for giving plt.'s landlord possession of a farm as a deserted farm, they produced in evidence a record of their proceedings under that act, which set forth all such circumstances as were necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, it was held conclusive, as an answer to the action: *Busten v. Carew*, 3 B. & C. 649. Where, in trespass against magistrates, for breaking, entering, &c., the plt.'s close, in the parish of, &c., and seizing his sheep, it appeared

that the defts., upon the complaint of the surveyor of the highways, appointed for the whole parish, convicted the plt. of neglecting to do statute-duty, and issued a warrant to levy the penalty under which the act complained of was done, it was held that the conviction being good upon the face of it was a sufficient defence, and that the plt. could not, in this action, try the question, whether the land which he occupied was exempt from the burden of repairing the roads in other parts of the parish: *Fawcett v. Fowles*, 7 B. & C. 394. The want of jurisdiction must appear from the conviction itself, as plt. cannot show, by extrinsic evidence, that the subject-matter of the conviction was not within the deft.'s jurisdiction, *Gray v. Cookson*, 16 East, 23, 1 B. & B. 432, though this was formerly doubted: *Terry v. Huntingdon*, Hardr. 480; 1 Str. 710. But, as observed by *Ld. Ellenb.*, with regard to an order of justices for diverting a highway, justices cannot make facts by their determination, in order to give to themselves jurisdiction contrary to the truth of the case: *Welsh v. Nash*, 8 East, 402; 1 B. & B. 439. To render the conviction a sufficient defence, it must be connected with the commitment, and, if it be a conviction for an offence differing from that recited in the commitment, it will afford no defence: *Rogers v. Jones*, 3 B. & C. 409; 5 D. & R. 484. And, if the warrant of commitment does not show an offence over which the justices had no jurisdiction, a previous regular conviction will be no defence; *Wickes v. Clutterbuck*, 2 Bing. 483. But the warrant of commitment must be substantially defective, and not merely in stating some immaterial fact, which may be rejected: *Massey v. Johnson*, 12 East, 67. It is not essential to the validity of the conviction, that it should actually have been drawn up at the time when it takes place, unless it be directly impeached: *Gray v. Cookson*, 16 East, 20; McCl. & Y. 478; see, further, as to effect and proof of conviction, *ante*, "Conviction."

*Tender of Amends.*] The notice of action required by 24 G. 2, c. 44, s. 2, is to enable the justice to tender amends, and afterwards to plead; therefore, where he does plead it, he must give evidence at the trial that he made a regular tender of the exact sum pleaded, within a [\*619] month after notice \*of action given. Where the deft. pleaded a tender of amends to the amount of forty shillings, which was admitted by the replication, and the notice of action was for seizing and carrying away goods to the value of forty shillings, it was held that the plt. could claim no more than forty shillings, which, being covered by the tender, he was nonsuited: *Stringer v. Martyr*, 6 Esp. Rep. 134. The deft. has been allowed to pay money into court, after issue joined, and to withdraw his plea and plead *de novo*, the general issue, which is equivalent to a tender of amends, and which, if the jury find sufficient, deft. will have a verdict; deft. should therefore be prepared with evidence of the rule of the court, to be given at the trial, as the sum paid into court will be ascertained by it: *Nestor v. Newcome*, 3 B. & C. 159; 4 D. & R. 476.

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LANDLORD AND TENANT.—See DISTRESS;—LEASE;—USE AND OCCUPATION;—NUISANCE.

## LEASE, ACTIONS ON.

FORM OF REMEDY ON, 619.

FORM OF PLEADINGS, 621.—*Declaration, ib.*—*Plea*, 623.

PRECEDENTS, 624.

EVIDENCE.—*Under non est factum*, 626.—*Under nil debet, ib.*—*Under plea traversing Plt.'s Title*, 627.—*Under plea denying Assignment, &c. to Deft., ib.*—*Under Plea of Deft.'s Assignment of Interest to another Person*, 628.—*Under Plea denying Performance of Conditions Precedent, ib.*—*Denying in arrear, &c.*—*Denying Breach of Repairs*, 629.—*Denying Breach of Quiet Enjoyment*, 630.—*Denying Breach of Deft.'s having assigned Premises*, 631.—*Denying Breach of excusing a Particular Trade*, 632.

*Form of Remedy.*

*Covenant* lies, and is the most usual remedy, on leases, at the suit of the lessor, or his assignee, or against the lessee, or his assignee, 1 Saund. 241, c., 3 Co. 22, b., 2 East, 580; and it is the only remedy where the action is not for a liquidated demand. An assignee of part of the premises may be sued in covenant, Sir W. Jones, 215, 2 East, 580: and covenant lies for an apportionment against the assignee of the lessee, in case of a partial eviction by a stranger, though it does not in such case lie against the lessee: *post*; 2 East, 575. Covenant alone lies against the lessee, after he has assigned the lease, and the lessor has accepted the assignee as his tenant, and then only on an *express* covenant, and not upon a covenant in law: 1 Saund. 241, n. 5; 1 T. R. 92. Covenant does not lie against the lessee for rent, after there has been an eviction from a part of the land, even by a stranger, the only remedy in that case being by debt or distress: 2 East, 575. It seems that covenant does not lie by the lessee against his assignee (by deed-poll, where there was no covenant to repair) for not repairing: 5 B. & C. 589. By the common law, upon the death of a lessor seized in fee, his heir, though not named in the lease, \*might maintain an action for the breach of any covenant [\*620] running with the land: 2 Lev. 92. No person, however, except the original parties to the covenants, were capable of suing on the lease, and of course no grantee or assignee of any reversion or rent: *ib.* To remedy which, 32 H. 8, c. 34, gives the assignee of a reversion the same remedies against the lessee or his assignee, or their personal representatives, upon covenants running with the land, as the lessor or his heir, or their successors, had at common law; and it also, on the other hand, renders such assignee liable to an action for a breach of covenant running with the land, as the lessor, &c. was at common law, 3 Bl. C. 158, an assignee of part of the reversion, *Doe v. Hawthorn*, 2 B. & A. 103; and a remainder-man is included in the statute: 3 M. & S. 382. Covenant lies against the lessee or patentee of the crown, although he did not seal any counterpart of the lease, it being matter of record, and the lessee's acceptance of the demise being in such case as obligatory as an express covenant: Cro. J. 399, 521; Com. D. *Covenant*, A. 1; 5 B. & C. 589. So, if a lease be made to A. & B., and A. only execute, but B. agree thereto,

he may, it is said, be sued jointly with A. upon a covenant running with the land: Co. Lit. 231, *a.*; 2 Roll. Ab. 63; Com. D. *Covenant, A.* 1. Covenant lies, though the covenantee did not execute, Lutw. 305.

*Debt* is sustainable on a lease against the lessee, 1 Saund. 2, 41, *n.* 5, or the assignee of the lease, *ib.*, 5 B. & C. 512, 2 D. & R. 76, 1 Lev. 22, for rent or penalties, as for ploughing up meadow, &c., or for rent charges against the pignor of the profits of the estate, Cro. El. 268, 895; it does not lie, however, for the arrears of a yearly rent, devised payable out of lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout, so long as the estate of freehold continues: 4 M. & S. 113; 2 Saund. 304, *n.* 8; 1 Chit. Pl. 100. Debt, as we have before seen, does not lie against the lessee, where he has assigned his interest, and the lessor has accepted the lessee as his tenant: *ante*, 619.

Where there has been a lease, containing covenants of any description, which has expired, and the tenant continues to hold as before, he holds subject to all the covenants contained in the lease; but, during the continuance of the lease, the plt. must declare in covenant: when it has expired, however, and the tenant continues to hold over, the law raises an assumpsit that he shall continue to hold on the same terms as the covenants in the lease, when subsisting, would have subjected him to; and for any breach of these, the lessor may recover by a special action of assumpsit: 1 Esp. D. 7.

In some cases, where the breach of a covenant amounts to a misfeasance, the party may proceed by action of covenant, or by action on the case, as against a lessee, either during his time or afterwards, for waste: 2 W. Bl. R. 848, 1111; *ante*, 111-137.

With respect to which is the *most advisable form of remedy*, in an action for rent, where it is doubtful whether the devise were by deed, it is advisable to declare in debt on the lease, stating the substance of the terms of the demise, and adding a count for use and occupation: 2 Chit. Pl. 430, *n. a.* It is frequently more advisable to proceed in covenant on a lease, &c. for general damages, than to declare in debt for a penalty securing the performance of a covenant, *ante*, 149-320, Burr. 1087, 1351, 1 Ld. Raym. 814, 1 Chit. Pl. 108; and, where rent is due upon a lease, and there has been another breach for not repairing, for which the plt. claims unliquidated damages, covenant is preferable to debt: *ib.*

[\*621]

*\*Form of Pleadings.*

DECLARATION—*Venue.*] In an action on a lease, for nonpayment of rent, or other breach of covenant, when the action is founded on the privity of contract, it is transitory, and the venue may be laid in any county; but, when the action is founded on the privity of estate, it is local, and the venue must be laid in the country where the estate lies: 3 T. R. 394; 1 Chit. Pl. 244. In an action of debt or covenant, by the lessor against the lessee, or by the lessee against the lessor, the action, being founded on the mere privity of contract, is transitory, and, though the land be abroad, the action may be brought in England: 1 Saund. 241, *b. n.* 6. An action of covenant by the assignee of the reversion against the lessee, or by the lessee against the assignee of the reversion, upon an

express covenant contained in the lease, and running with the estate in the land, is transitory, by the operation of 32 H. 8, c. 34: 1 Saund. 237, 141, *b. n.* 6. But, in debt by the assignee or devisee, *ib.* 238, of the lessor against the lessee, which is sustainable at common law, and is founded on the privity of estate, the action is local: 1 Chit. Pl. 245. If an action of debt or covenant be brought by the lessor, 2 East, 579, or his personal representatives, Lutw. 197, or by the grantee of the reversion, 1 Saund. 241, *c. n.* 6, against the assignee of the lessee, or in an action of debt against the executor of the lessee in the *debet* and *detinet*, *ib.* 244, the venue is local, and must be laid in the county where the property lies: 2 East, 580. For the same reason, covenant by the assignee of the lessee, against the lessor, or the grantee of the reversion, is local, for it lies at common law, in respect of the privity of estate, which is always local: 1 Saund. 241, *c. n.* 6.

*Statement of Title.*] In debt or covenant upon a lease, by the lessor against the lessee, for the non-payment of rent, it is not necessary to set forth the lessor's title to the lands demised; but the declaration merely states, that the plt., on, &c., at, &c., by a certain indenture, made between him and the deft., with a profert thereof, demised, and, if the title be unnecessarily set forth, it will generally be considered as surplusage: 1 Str. 230; 1 Saund. 233. But in an action by an assignee of the reversion, or by the heir of the lessor, he must set out the title of the lessor to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plt.: Cliff. Ent. 213, *pl.* 7; 1 Saund. 231. Such title is traversable, see 4 Moo. 303, 1 D. & R. N. P. C. 1, it is usually stated as inducement, and precedes the statement of the lease; as, when the estate demised is copyhold, by alleging that fact, and that the lessor was seized at the will of the lord, according to the custom of the manor, or where the plt. claims as assignee of a term, or as executor, or lessor, for rent, &c., due since his death, by stating that the lessor, at the time of making the lease, was possessed of the demised premises for the residue of a certain term of years, 7 T. R. 538; see the various modes and forms of stating title, 2 Chit. Pl. 560 to 592. In actions brought by an assignee of a term, all the mesne assignments of the term, down to himself, should be stated, for he, being privy to them all, shall not be allowed to plead, generally, that the estate of the lessee, of and in the demised premises, came to him by assignment; when the action, however, is against the assignee of a lease, such general form of pleading is sufficient, as plt. is a stranger to the deft.'s title: *post*, 623.

*Statement of Lease.*] In covenant on lease, such a lease must be properly set forth, and it must be stated to be under seal: 2 Ld. Raym. 1536; *ante*, "Covenant." In *debt*, however, for rent reserved by a lease, though plt. may declare without stating the deed, unless in the case of incorporeal hereditaments, as tithes, &c., 1 Saund. 276, *n.* 1, 202, 325, *n.* 4, 2 Ld. Raym. 1503, 2 Saund. 297, *n.* 1, it is usual to state the time of making, and the "date, of the lease. The lease, how- [\*622] ever, may be stated to have been made on a day differing from its date, but it must not in that case be stated to bear date on that day: 4 East, 477. The parties to the lease must be correctly described, *ante*, 620-393; it is best to leave out their additions. If a tenant for life and

the remainder-man join in a lease, it must not be described as the lease of both, but as the lease of the tenant for life, and the confirmation of the remainder-man: *Ld. Southampton v. Drummond*, 6 B. & C. 718. A profert of the lease, or an excuse for not making it, must be stated: 4 East, 585; *post*, "*Profert*." No part of the recitals need, nor should they, be stated, if they do not materially affect and explain the sense of the subsequent part of the lease set forth in the declaration. No part of the consideration need be stated; but if the plt. states any part of it, he should state the whole: 2 B. & A. 765; 1 Chit. Rep. 508.

The demise itself should be stated in the past tense, and according to the legal effect. In a declaration, it is sufficient to say, "it is witnessed that A. B. demised," &c., though not so in a plea: 1 Saund. 274, n. 1; 1 Ld. Raym. 1539; 1 B. & C. 358; 2 D. & R. 662.

*Statement of Premises.*] The premises should be set forth shortly, and it is not necessary nor advisable to set forth their local situation: 1 Saund. 233, n. 2; 2 Saund. 366, n. 1; 4 Taunt. 700. If the name of the premises be stated, it must be proved accordingly, and stating them to be Cellar beer, instead of Aller beer, has been held a fatal variance: 9 East, 188. So, if the premises be described as store-houses, and in the deed only as a store-house, it would be fatal, 4 M. & S. 470; so, if the local situation be misstated, 1 Marsh. 214; or if the name of the late tenant be misstated: 1 Camp. 195; 15 East, 161; 1 Stark. 100. And so, in covenant on a lease of veins of coal under certain farms and lands therein described, &c., with liberty to dig pits, soughs, &c., where the declaration varied from the deed, in stating that the land was set out by admeasurement, instead of reputation, and changing the word soughs to sloughs, it was held these were fatal variances; 2 Marsh. 296; 6 Taunt. 394, s. c. A declaration, stating a demise of "a farm, lands, and buildings," supports a demise of "a farm, land, and buildings," 1 Y. & J. 2; and a declaration on a demise of lands, where only one piece of land was demised, is no variance: 6 M. & S. 115. If fixtures, or other personalty, be demised, and they constitute a part of the consideration for the covenant, they should be stated; see 11 Price, 19. As to stating an exception and reservation, out of part of the premises, see *Vavasour v. Ormrod*, 6 B. & C. 431.

*Statement of Covenants.*] The words of the lease and covenant should, in general, be set forth *verbatim*. No unnecessary covenant, or other irrelevant parts of the lease should be stated; 1 Saund. 233, n. 2; 2 Saund. 366, n. 1. The court will censure the statement of any superfluous matter; Cowp. 665; Doug. 667. Any matter which qualifies the contract must be stated, or the plt. will be nonsuited on *non est factum*. Thus, in stating a covenant for not repairing, &c., if the covenant to repair contains an exception of fire, and all other casualties, it should be stated, 4 Camp. 20, 4 Moo. 164, 1 *ib.* 89, 2 B. & B. 395, 11 East, 640; and, as to conditional covenants, see 6 M. & S. 9; 6 B. & C. 431; 2 Saund. 352. If the declaration profess to set out the terms of the reservation of rent, it is a variance to omit an exception referring to a subsequent proviso, by which a deduction is to be made, if a certain event happen, although that event have not happened: 6 B. & C. 490.



*Reference to Lease.*] This is usual, though unnecessary: *post*, "*Profert.*"

*\*Statement of Lessee's Entry.*] If the lease be a lease for [\*623] years, it is not necessary, though usual, to state an entry or occupation by the lessee; for, though he neither enter nor occupy, he is liable to pay the rent, it being due by virtue of the lease or contract, and not by the occupation, 1 Salk. 209; and even in an action by the assignee of the reversion, 1 Saund. 293, *a. n. b. 5 ed.*, or against the assignee of the lessee: 1 Ld. Raym. 367; 3 Moo. 527; 1 B. & B. 238, *s. c.*; 7 East, 340, *n. a.* But, in debt for rent upon a lease at will, it is otherwise, as the rent becomes due in consequence of the occupation: 1 Salk. 209. The time of entry, though often inserted, is unnecessary, as it is generally sufficient to state it, without showing the time: Cro. J. 549; 1 Saund. 203, *n. 1.*

*Statement of Defendant's Title when he is Assignee, &c.*] In an action against the assignee of the lessee, &c., it suffices to state concisely the assignment to deft., as will be found in the precedent, *post*, 625, and this though there have been intermediate assignments, and though the deft. be assignee or part only, 5 B. & C. 482, 1 Saund. 519, *b. n. 1*, 6 Mod. 72, or though the deft. be an heir, 4 T. R. 75, or executor, if he took to the premises: 1 Salk. 317; 4 T. R. 75. But it is not sufficient to allege that the tenement *came* to the deft. by assignment; it must be shown that he is assignee of the *term*, as it would otherwise be an assignment of another estate, through the term of the lessee: 1 Saund. 112, *b. n. 1.* If the plt. unnecessarily profess to state the deft.'s title, and deft. traverse it as stated, it must be proved as stated: 3 B. & P. 461. As to mode of pleading and assignment of a term to commence in future, 1 Saund. 253.

*Statement of Plaintiff's Performance of Covenants.*] The usual averment of general performance by the plt. is unnecessary: 1 Saund. 235, *n. 5.* If there be any condition precedent, then the same must be specially averred to have been fulfilled: *ante*, 393-129.

*Breach.*] The breach may be in the negative of the covenant generally, 3 T. R. 307; or according to the legal effect: 1 Saund. 235, *n. 6*; see, further, as to this, *ante*, 133: If the breach be for non-payment of rent, it must be shown when the rent became due: Gilb. Debt, 407. Stating it became due for so many quarters on such a day, "then elapsed," will suffice, without stating it was "the last elapsed:" 4 B. & C. 157. How to describe rent due to tenant in common: *ib.* The amount of the damages stated at the conclusion, should be enough to cover the full amount claimed: see, further, *ante*, "*Covenant*," 393.

**PLEA.]** The general rules as to pleas in covenant, and debt in general, here apply: *ante*, "*Covenant*," 393. There is no general issue in covenant, and *non infregit conventionem* is a bad plea, 2 Saund. 278, 1 Stark. 311; so is *rien en arriere*: Cowp. 588. Accord and satisfaction, after breach, is a good plea: 1 Taunt. 428; Com. D. *Pleader*, 2 V. 8. A lessee or assignee cannot plead *nil habuit*, or a general traverse of the lessor's estate, or that he had only an *equitable* interest: but he may

show and plead, in an action by an assignee, &c., that the lessor was entitled to a different estate: 2 Str. 817; 8 T. R. 487; 2 Saund. 207; 4 Moo. 303; 2 Bing. 54-10. A lessee cannot plead he was not lessee: 4 Taunt. 642. In debt for rent, and eviction may be given in evidence under the general issue; but in covenant it must be pleaded: 1 Saund. 204, *n.* 2. In a plea by an assignee in debt, that he assigned over all his interest before any breach took place, it is not necessary to aver a notice of that assignment: Bac. Ab. *Covenant*, E. 4; 2 Vent. 234; Sid. 339. The plea to an action for not repairing, should be conformable to the breach, and may be either that the deft. did repair, &c., in the words of the [\*624] covenant, or that "the premises were not out of repair, in the negative of the breach usually assigned in the declaration. It seems preferable to plead that deft. did repair, and that the premises were not dilapidated, negating the breach, as assigned in the declaration: 3 Chit. Pl. 1019, *n.* b.

### Precedents.

#### DECLARATION IN COVENANT BY LESSOR AGAINST LESSEE FOR RENT.

Ellenborough.

Trinity Term, 9 Geo. 4.

(*Venue*.) (to wit,) *ante*, 621. A. B. complains of C. D., being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of breach of covenant (*see form in C. P.*, *ante*, 304, *stating the plea to be "of a breach of covenant,"*) for that whereas, heretofore, to wit, on, &c. (*date of lease*), at, &c., by a certain indenture then and there made between the said plt. of the one part, and the said deft. of the other part (one part [*or*, "the counterpart"] of which said indenture, sealed with the seal of the said deft., the said plt. now brings here into court, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid,) the said plt. did demise, lease, and to farm let unto the said deft. a certain messuage or dwelling-house, and premises, with the appurtenances in the said indenture mentioned, to have and hold the same, with the appurtenances, unto the said deft. from, &c. (*as in lease*), to the full end and term of — years thence next ensuing, and fully to be complete and ended (*as in lease*.) Yielding and paying therefore, yearly and every year to the said plt. the yearly rent or sum of £—, payable quarterly, at the hour most usual feasts or days of payment of rent in the year (that is to say,) &c. (*as in lease*), in each and every year, by even and equal portions. And the said deft. did thereby for himself covenant, promise, and agree, to and with the said plt., that he, the said deft., should and would well and truly pay, or cause to be paid, to the said plt. the said yearly rent or sum of £—, at the several days or times aforesaid, as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said demise, the said deft., afterwards, to wit, on the day and year first aforesaid, entered into and upon the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted, as aforesaid; and although the said plt. hath always hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning, of the said indenture, to wit, at (*venue*), aforesaid, yet, protesting that the said deft. hath not performed, fulfilled, or kept, any thing in the said indenture contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning, thereof, the said plt. saith, that, after the making of the said indenture, and during the said term thereby granted, to wit, on, &c. (*day when rent became due*), at, &c., aforesaid, a large sum of money, to wit, the sum of £—, of the rent aforesaid, for half a year of the said term then last elapsed, became and was, and still is, in arrear and unpaid to the said plt., contrary to the tenor and effect, true intent and meaning, of the said indenture, and of the said covenant, of the said deft., by him in that behalf so made, as aforesaid, to wit, at, &c., aforesaid. And so the said plt. in fact saith, that the said deft. (although often requested so to do) hath not kept the said covenant so by him made, as aforesaid, but

hath broken the same, and to keep the same with the said plt. hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plt. of £—; and therefore he brings his suit, &c. Pledges, &c.

## COVENANT BY LESSOR AGAINST ASSIGNEE OF LESSEE, FOR NOT REPAIRING.

For that whereas, heretofore, to wit, on, &c., at, &c., by a certain indenture then and there made between the said plt. of the one part, and one E. F. of the other part, (one part [or, "counterpart"] of which said indenture, sealed with the seal of the said E. F., the said plt. now brings here into court, the date whereof is a certain day and year therein mentioned, \*to wit, the same day and year aforesaid,) the [625] said plt., for the considerations therein mentioned, did demise, lease, and to farm, let unto the said E. F., his executors, administrators, and assigns, a certain messuage, &c. (*Here set out the premises, the habendum, and the reddendum, shortly, as ante, 624; and then state the covenants as follows:*) And the said E. F. did, in and by the said indenture, for himself and his executors, administrators, and assigns, covenant, promise, and agree, to and with the said plt. in manner following (that is to say, that he, the said E. F., and assigns, should and would at all times, during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain, and keep, the said messuage, &c. (*as in the covenant*), in good and tenable repair, order, and condition, and the same premises, and every part thereof, should and would leave in such good repair, order, and condition, at the end, or other sooner determination, of the said term, and should and would peaceably and quietly quit, yield, and deliver up to the said plt., without doing, committing, or suffering to be done or committed, any waste, spoil, or damage, to the same, or any part thereof, as, by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. And the said plt. in fact saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on, &c. (*any day about time of assignment*), at, &c., aforesaid, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim, and demand, whatsoever, of him, the said E. F., of, in, and to the said demised premises, with the appurtenances, by assignment thereof, then and there made, legally came to, and vested in, the said deft.; whereupon and whereby the said deft. then and there entered into and upon the said demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed, from thence until the — day of —, A. D. —, when the said demise ended and determined, to wit, at, &c., (*venue*), aforesaid. And, although the said plt. hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled, and kept, all things therein contained, on his part and behalf to be performed, fulfilled, and kept according to the tenor and effect, true intent and meaning, thereof, to wit, at, &c. (*venue*), aforesaid; yet, protesting that the said deft., since the said assignment, so made, as aforesaid, hath not performed, fulfilled, or kept, any thing in the said indenture contained on his part and behalf, as such assignee, as aforesaid, to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning, of the said indenture, the said plt. in fact saith, that the said deft. did not nor would, after the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, at his own costs and charges, support, uphold, maintain, and keep, all and every the said messuages, &c. (*as in the covenant*), of the said demised premises, in good tenantable repair, order, and condition, nor did nor would leave the same premises, in such good repair, order, and condition, at the determination of the said term, according to the form and effect of the said indenture in that behalf, but, on the contrary, thereof, he, the said deft., after the making of the said indenture, and after the said assignment to him, the said deft., as aforesaid, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, to wit, on, &c., and from thence for a long space of time, to wit, from thence until the determination of the said term, suffered and permitted the said messuage, &c. (*as in the covenant*), to be and continue, and the same were for and during all that time, ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary maintaining, supporting, upholding, and keeping, the same; and the said deft., at the determination of the said term, left the same premises in such repair, order, and condition, as last aforesaid, contrary to the form and effect of the said indenture, and of the covenant so made by the said E. F., for himself and his assigns, as aforesaid, to wit, at, &c., (*venue*), aforesaid. And so, &c. (*Conclude as ante, 624.*)

[\*626]

## \*DECLARATION IN DEBT FOR RENT ON A LEASE.

That whereas the said plt., heretofore, to wit, on, &c., at, &c., demised to the said deft. a certain messuage and premises, with the appurtenances, situate in the county of A. to have and to hold the same to the said deft. for a certain term of years, to wit, for and during and until the full end and term of seven years, then next ensuing, and fully to be complete and ended, yielding and paying, therefor, during the said term, to the said plt. the yearly rent of £—, of lawful, &c., at the four most usual feasts or days of payment in the year (that is to say,) &c. (*as in lease*), by even and equal portions. By virtue of which said demise, the said deft. entered into the said demised, premises, with the appurtenances, and was possessed thereof from thenceforth until and upon the — day of —, when a large sum of money, to wit, the sum of £—, of the rent aforesaid, for the space of — then last elapsed, became and was due and payable from the said deft. to the said plt. and still is in arrear and unpaid to the said plt., to wit, at, &c., aforesaid. Whereby an action hath accrued to the said plt., to demand and have of and from the said deft. the said sum of £—, parcel of the said sum above demanded. (*Add a count in debt for use and occupation, and account stated. See "Use and Occupation."*)

See other forms of covenant on stating performance of condition precedent, 3 Chit. Pl. 552; covenant for galage rent of coal-mines, *ib.*, 557; covenant for ploughing up meadow, &c., whereby deft. forfeited £5 per acre, *ib.*; for not insuring, *ib.*, 558; by lessee, for not paying quit-rent, *ib.*, 559; see, also, form in debt against assignee for rent, and amount of land-tax not redeemed, *ib.*, 431; and debt on Land-Tax Redemption Act, *ib.*, 432. See the various forms and modes of title stated in 2 Chit. Pl. 560 to 562.

## PLEA BY ASSIGNEE, TRAVERSING THE ASSIGNMENT TO HIM.

(*Action non, as post, "Pleas."*) Because he saith that all the estate, right, title, interest, and term of years then to come and unexpired, property, claim, and demand whatsoever, of the said E. F., of and in the said premises, with the appurtenances, by assignment thereof duly made, did not come to and vest in the said deft., in manner and form as the said plt. hath above thereof complained against him; and of this the said deft. puts himself upon the country, &c.

See form of plea of tender of rent on land before sunset, 3 Chit. Pl. 1018; that lessor was seized for life, and not in fee, *ib.*; that premises were not out of repair, *ib.*; bankruptcy, *ib.*, 1020; set-off, *post*, "Set-off;" accord and satisfaction, *ante*, 25; see form of plea in debt *rien en arriere*, *ib.*, 992; *arileth*, *ib.*, 993; plea by lessee of assignment of the term to a third person, *ib.*; and by an assignee, of assignment of term before rent due, *ib.*, 994.

*Evidence for Plaintiff.*

The evidence on the part of the plt. will depend on the issue taken by the plea, which, we have seen, must, in covenant, be generally special.

*Under Non est Factum.*] Under this plea, plt. will have to prove the execution of the lease, as stated in the declaration; and, under it, deft. may take advantage of a variance. As to the mode of proving the lease, see *ante*, "Deed."

*Under Nil debet.*] Under this plea, plt. will have to prove all the facts stated in the declaration; and deft. may take advantage of all defences he is generally entitled to under this plea; see *ante*, 406. Plt. must prove the lease, under *non est factum*; though, indeed, if he should fail in so doing, he may, if there be a count for use and occupation in the declaration, prove the rent due, as in other cases: *post*, "Use and Occu-

*ption.*" As to an eviction which deft. may give in evidence under this plea, see *post*, 630.

*Under Plea, traversing Plaintiff's Title as Assignee, &c.* [\*627]

Under this plea, plt. must prove his title, as stated in his declaration, and put in issue by regular evidence. If he claim his title by deed, as, by direct assignment from the lessor, *e. g.*, he must call the subscribing witness to prove the execution of it. The assignment must be by deed or note in writing, or by act<sup>d</sup> and operation of law: 29 Car. 2, c. 3, s. 3. To effect an assignment, it is necessary that the conveyance by which the property is to be transferred be fully perfected: 5 Rep. 113. But, where A., the assignee of a lease, put it up to auction, and B. became the purchaser, and paid the deposit, and ordered an assignment to be prepared by A.'s solicitor, and the assignment was accordingly prepared and executed by B., but, instead of being delivered to him, was retained by the solicitor, who claimed a lien thereon for the expense of preparing it, *Ld. Ellenb.* held, the assignment was complete, though the deed had never been delivered to or accepted by B.: *Odell v. Wake*, 3 Camp. 394. The transfer of a mere equitable interest will not make a man assignee: *Doe d. Maslin v. Roe*, 5 Esp. Rep. 105; 2 Chit. Rep. 166. The assignee must be of the same estate as the person whom he succeeds: for, if he come in by an older title, he will not be assignee: *Moo*. 876. If the plt. claim as assignee at law, as, by his being heir to the lessor, he must prove that he is so; if as devisee, he must produce the will, and prove its regular execution by the testator, by the subscribing witnesses. If the lessor or grantor had an interest for years only, and the plt. declares as legatee, executor, or administrator, of the lessor, probate of the will will then be sufficient to show the bequest to the legatee; but he must also show the assent of the executor to his taking the lease; and it will also establish the executor as plt.—His title will be proved by the letters of administration: *ante*, 460, 504. Where the title is derived from marriage, as an estate or term in right of his wife, it must be regularly proved, as *ante*, 396. Where the title is by a private act of Parliament, it must be proved by an examined copy: *ante*, 34; see Esp. Ev. 235; and see, further, as to the mode of proving title in ejectment, *ante*, 457 to 463.

*Under Plea, denying Assignment to Defendant.*] Under this plea, the plt. must prove deft. is assignee; but it will be sufficient for him to give general *prima facie* evidence, from which an assignment to the deft. may be inferred; as, where he proves that deft. is in possession, or his having paid rent, &c.; and payment of rent to the plt. by the deft., who has been let into possession of the premises by the original lessee, is *prima facie* evidence of an assignment of the whole term, Esp. Ev. 203, Pea. Ev. 267, 304. The deft. may, however, give in evidence that he is not assignee of the whole interest, or is an under-tenant only; in which cases the plt. cannot recover against him: *Holford v. Hatch*, Doug. 174; *Devisley v. Custance*, 4 T. R. 75; Cowp. 766; *Merceron v. Dowson*, 5 B. & C. 479; and the preceding observations as to what evidence is essential to constitute a party assignee, will be here applicable.

Where the action is against the assignees of a bankrupt, or trustees under an assignment for the benefit of creditors, on a demise of land or premises which belonged to the bankrupt, *Wheeler v. Bramah*, 3 Camp.

340, or the debtor assignor, the plt. must prove that the assignees took possession of the premises demised, and kept the possession, not merely to try to ascertain the value of them, but as taking to the interest, with a view to make it an efficient part of the bankrupt's estate: *Bourdillon v. Dalton*, 1 Esp. Rep. 233; *Turner v. Richardson*, 7 East, 335; *Carter v. Warne et al.* 4 C. & P. 191; *ante*, 249. This is often matter of some difficulty in evidence, as to what shall amount to a taking of the premises. The plt. should, therefore, be prepared with witnesses to prove when the assignees took possession, how long they held them, and what acts of ownership they exercised: Esp. Ev. 203. Where the plt. applied to the defts. for the possession, and they refused it, or gave him an equivocal answer, that fact should be shown by the plt.: *Turner* [\*628] *v. Richardson*,\* 7 East, 339. Proof that the assignees entered and took actual possession, although the bankrupt's effects were upon the premises, and the assignees delivered up the key immediately after the effects were sold, will be sufficient to show they were liable, *Hanson v. Stevenson*, 1 B. & A. 309; and so will proof that they intermeddled with and assumed the management of the farm, *Thomas v. Pemberton*, 7 Taunt. 206, 4 Camp. 368; and so will proof that the assignees put up the lease for sale, and sold it; and received a deposit from the purchaser, unless indeed, the purchase was afterwards rescinded: *Hastings v. Wilson*, Holt, 290. And, where the bankrupt had a lease of premises, and also a reversionary interest in them, and the assignees sold all his reversionary estate and interest in the premises, it was held the assignees must be considered as having accepted the lease: *Page v. Godden*, 2 Stark. 309. But proof of merely putting up the term to auction, to ascertain if it were of value, without giving themselves out as proprietors, and interfering no further, will not be sufficient to render them liable, *Turner v. Richardson*, 7 East, 335; and the mere fact of the assignees not having delivered up the key of the premises will not be sufficient, *Wheeler v. Bramah*, 3 Camp. 340; nor will their having paid rent, to avoid a distress on bankrupt's goods, *ib.*; nor will their releasing an under-tenant: *Hill v. Dobie*, 8 Taunt. 325; 2 Moo. 342, s. c.; Arch. B. L., 127.

An assignee is liable only in respect of the privity of estate, viz. to all covenants in deed which run with the land, and to all covenants in law: 3 T. R. 398; Cro. J. 523. He cannot be charged for a breach of covenant happening previously to the assignment to him, *Grescot v. Green*, 1 Salk. 119, Burr. 1271; but, immediately upon the assignment being made, the assignee becomes liable, even before his entry upon the premises; 2 Doug. 461, 1 Ld. Raym. 367; and he is liable for a breach continued by him: Com. D. *Covenant*, B. 3. A mortgagee is liable as another assignee, *Williams v. Bosanquet*, 1 B. & B. 238: as to his being discharged by assignment, see *infra*.

*Under Plea that Deft. assigned his Interest before Breach.*] An assignee may show, under this plea, that before the covenant was broken he had assigned over his whole interest in the premises to another: *Eaton v. Jaques*, Doug. 438. As to proving the assignment, the deed should be produced and proved in the regular way, *ante*, "Deed;" and the assignee himself had better be subpoenaed. Such assignment discharges the assignee, though he made it without notice to the lessor, 1 Show. 340,

4 Mod. 71, 1 Salk. 81, 2 Vent. 234, 1 V. & B. 11; or though it was done for the purpose of avoiding the liability; or was to a mere pauper, *Taylor v. Shum*, 3 B. & P. 21, 2 Atk. 548, Str. 1221; or to a *feme covert*, Doug. 452. And the assignee of a term, declared against as such, is not liable after he has assigned over, though it be shown that the lessor was a party executing the assignment, and thereby agreed that the term, which was determinable at his option, should be absolute: *Chancellor v. Poole*, Doug. 764. If the assignee has assigned away only *part* of his interest, he remains liable as assignee *pro tanto*: Cro. Car. 321; 5 B. & C. 479.

*Under Plea denying Performance of Conditions Precedent by Plt.]* Where there is any thing to be done by the plt. previous to that which the deft. covenants to perform, he must, under this plea, prove that he has executed, or offered, and was ready to do so, as stated in the declaration. Thus, if the deft. had covenanted to pay a certain sum of money on the plt.'s executing an assignment of certain premises to him, the plt. must show that he either did assign, or that he tended and offered such a deed to the deft. which deft. declined to accept, Esp. Ev. 233: see *ante*, 121 *et seq.*: as to covenant to find timber, see *post*, 629.

\* *Under Plea denying Rent in Arrear or Payment.]* The [\*629] issue under this plea lies on the deft.; for the lease being proved, the reservation and amount of the rent appear by it. The plt. is, therefore, called upon for no further proof, but the deft. must prove actual payment: Esp. Ev. 237. The covenant to pay rent may be enforced, though the premises be destroyed by enemies, Aleyn, 26, Style, 47; or by fire, Str. 763, 2 Ld. Raym. 1477; or by tempest, Dyer, 56, *a.*, Aleyn, 28; or sequestration, Hetl. 54; see 3 Taunt. 469. •

*Under Plea that Premises were in Repair.]* Under this plea the plt. must not only prove that the house was ruinous and decayed, but also what sum it would require to repair, as that is the proper measure of his damages: Esp. Ev. 234. This he must prove by witnesses, usually surveyors, who have made an estimate; otherwise he will only be entitled to nominal damages: Esp. Ev. 234. Deft. should be prepared to rebut the plt.'s evidence, and prove his having regularly repaired the premises during all the time. He may call as witnesses the persons who did the work, and prove the payments made to them on account of it. He should also prove, by a survey made shortly before the expiration of his term, that the repairs were such as were required from an outgoing tenant. Where there is a covenant for a tenant to repair, the lessor finding rough timber, if the tenant is sued on this covenant he may show that he required of his lessor to assign him, or supply him with rough timber, and that he refused or neglected so to do, which may be proved by a person who made the demand. If this be proved, it will be sufficient evidence for the deft., the finding the timber being a condition precedent.

The general covenant to repair extends to all buildings erected during the term, as well as to the buildings demised, 3 Lev. 264, 2 Vent. 126; but under a mere building lease, and where the evident intention of the parties was that the outbuildings should be pulled down, pulling them down will be no breach of covenant: Burr. 287.

With respect to what is a breach of repair, see *supra*, *ante*, 470. It

seems, the extent of the requisite repairs must be reasonably large. If the want of repairs be occasioned by accident, a reasonable time is allowed for completing them, *Shep. Touch.* 173-4, unless it be impossible to complete them: *ib.* If a lessee covenants to do all reparations to a house, at his own costs and charges, and he cut down some of the trees of the ground demised for that purpose, he is liable to an action of covenant: *Shep. Touch.* 174. Where the lessee covenanted to maintain, sustain, and repair two messuages, and, to an action on a bond given for the performance of these covenants, he pleaded that he had repaired all the messuages, with the exception of one kitchen, which was so ruinous that he could not repair it, but pulled it down, and rebuilt another in as short a time as possible, and that he had, at all times, well repaired the new kitchen, the court held, that though this would have been a good defence to an action for waste, yet it was not so in covenant: *Wood v. Avery*, 3 Leon. 189. Under a covenant to keep the premises in repair, the lessee may be sued for a breach of such covenant during the term: *Luzmore v. Robson*, 1 B. & A. 585. But, under a covenant to leave them in as good a state as he found them, if he pull them down during the term he will be guilty of no breach of covenant, for he may rebuild them: *Shep. Touch.* 173.

Under a covenant to keep in repair, and leave the premises in the same state as the lessee found them, the lessee is merely required to use his best endeavours to keep them in the same tenable state in which he found them. Natural and unavoidable decay is no breach of such covenant: *Shep. Touch.* 169.

[\*630] But supposing the covenant to repair generally, this appears to impose upon him the liability to uphold the "buildings, without regard to the necessary decay of the old materials: *Com. L. & T.* 184. Under a general covenant to repair buildings, &c., the lessee is liable to repair, though such buildings be destroyed by accident or tempest, *Aleyn*, 27, 6 T. R. 750, or by fire, *Dyer*, 35, *a.*, pl. 10, & *Show*, 401, 6 T. R. 650, 3 Ves. 34, 2 Saund. 420, n. 2, 5 ed.; but it would be otherwise, if there be an exception in the covenant against repairing in these cases; and, in that case, deft. should plead the exception, and prove his plea accordingly. A covenant to keep woods, lands, and natural productions, in the same state, will not render the lessee liable for an injury accruing to them from an act of God: *Shep. Touch.* 173; *Hardw.* 387. Where there is, besides a covenant to repair, a covenant by the lessee to insure for a certain sum, and the premises are burnt, the lessee's liability to rebuild is not limited to the amount of the sum for which he covenanted to insure: *Digby v. Atkinson*, 4 Camp. 275.

A covenant by the lessee, to leave the premises in repair, and a covenant that the lessor might direct the lessee to complete the repairs, by giving six months' notice in writing, are distinct and independent covenants, and the former is not qualified by the latter: *Wood v. Day*, 1 Moo. 389, and see *Roe d. Goatly v. Paine*, 2 Camp. 520; and 5 B. & C. 490. But, where a lessee covenanted to repair the premises at all times, as often as need should require, and at farthest within three months after notice, this was held to be one entire covenant, the former part of which was not qualified by the latter: *Horsfall v. Testar*, 1 Moo. 89.

The lessee cannot compel the lessor to repair the premises, unless there has been an express covenant by the lessor so to do, 1 Saund. 320; and even where the premises have been consumed by fire, and the landlord,



having insured them, has received the insurance money, the tenant cannot compel him to rebuild: *Pindar v. Ainsley*, 1 T. R. 312.

*Under Plea denying Breach of Covenant for Quiet Enjoyment, or stating Eviction.*] Where the plt. declares for a breach of a general covenant for quiet enjoyment in a lease from the deft. to him, it will be insufficient for him, under this plea, merely to prove that he has been disturbed and evicted, for that might be done wrongfully by a stranger, who would be subject to an action for it, *Vaugh*, 118, Cro. El. 214, 2 Leon. 104, Bac. Ab. *Covenant, B.*, Esp. Ev. 237; he must go further, and prove that it was done either by the lessor himself, or by some person claiming by elder title, or under him. For this purpose, the plt. must go into evidence of the manner in which he was disturbed in the possession, and show under what colour it was done: *e. g.*, if he was evicted by ejectment, he should show the judgment obtained in ejectment, by producing an examined copy, and calling the person who so recovered to prove the execution thereon executed. The covenant should be carefully examined, as the usual form of it by the lessor now is, "for quiet enjoyment against himself, and all those claiming by, through, or under him," *Browning v. Wright*, 2 B. & P. 13, *Barton v. Fitzgerald*, 15 East, 530; by whom are meant such persons as derive their title through him, as his assignees, heir, executor, administrator; in which case, though the lessee was disturbed or evicted, the lessor would not be liable, unless the plt. could prove that the person who disturbed him did claim by, through, or under his lessor, the deft. This may be done by the production of the proceedings, or by calling as well the party who has made the eviction, to state the ground of the proceeding: Esp. Ev. 238. A special covenant against interruption by J. S. extends to unlawful as well as lawful entries by J. S.: 1 Leon. 324; Cro. El. 212.

Where a lessee is likely to be disturbed in his enjoyment of the premises demised, as by having an ejectment served on him it is always \*prudent to acquaint the lessor of such proceeding, and [\*631] to give him notice, that, in case of eviction, he will be called upon under the covenant for quiet enjoyment. If that has been done, and the lessor has not defended the possession, and the plt. has, in consequence, been evicted, by giving evidence of his having given notice to his lessor to defend, it would seem to be sufficient to show the eviction only, without going into evidence of the title of the person evicting: Esp. Ev. 238.

It has been stated that the plt. must show the manner in which he has been disturbed, *Witchcot v. Nine*, 1 Brownl. 81; for it is necessary that it should be done by some act; for a verbal disturbance, as, by prohibiting his tenant, to whom he has underlet, not to pay rent to him, is not sufficient: Esp. Ev. 239. It is not necessary, however, to prove that the lessee was actually disturbed or ousted; the covenant means to insure to the lessee a legal entry and enjoyment: Cro. J. 204. A covenant for quiet enjoyment of a certain close is broken by the covenantor's setting up a gate across a lane leading to the close, by which A. is obstructed in passing to it: 8 Mod. 318. Where the lessor covenants that the lessee shall quietly enjoy the lands, discharged of all rents, the lessee ought to be discharged from a quit-rent: Co. Rep. 180.

The further evidence required under the breach of this covenant is, the

amount of the damages laid in the declaration, to which the evidence must be confined; as, if the plt. was evicted from a farm, without being allowed to cut his crops, he would bring the value and loss of them as his damages: *Esp. Ev.* 239.

*Under Plea, denying breach of Defendant's having assigned away the Premises.*] Under this plea, on a covenant not to "alien, assign, or part with the possession" of the premises, if the plt. proceeds on the latter part of the covenant, "the parting with the possession," after proving the execution of the lease, he has only to prove that some person, not the lessee, is in possession of the demised premises: *Grettor v. Diggle*, 4 Taunt. 766. If he proceeds on the former, he should call the person whom he supposes or knows to be the assignee, to prove that the deft. assigned the premises to him. The plt. is not called upon to prove any deed of regular assignment to him, as that belongs to the assignee: *Esp. Ev.* 203. But, if the deft. were so charged for having assigned, he may show that the person who is in possession, or presumed to be in possession, is not an assignee, but an under-lessee only, 1 W. Bl. R. 766; 3 Wils. 234; Dougl. 56: to prove which, he must either prove the lease made to him, by calling the subscribing witness, or by a person who knows the fact. The under-lessee himself is, for this purpose, a good witness: *ib.* Where a condition is, not to set, let, or assign over the said messuage, or any part thereof, a lease, which fell short of the twenty-one days, was held a breach, 2 T. R. 425; and a covenant not to let, set, or demise the premises, or any part thereof, for all or any of the term, restrains an assignment: 12 Ves. 395; and see 1 Camp. 20; 1 M. & S. 297. A covenant not to underlet is not broken by taking a lodger: *Doe d. Pitt v. Lanning*, 4 Camp. 77. The mere act of advertising the premises for sale is no breach of the covenant not to assign: 1 V. & B. 73. Deft. may also show that it was assured by devisee, *Style*, 482, or that he merely deposited the lease with a person who took it as a security for money advanced, for that is not a breach of the covenant: *Doe d. Pitt v. Lanning*, R. & M. 36. So, he may show that the premises were assigned by operation of law involuntarily, as to his assignees, or by them, in consequence of his becoming a bankrupt: *Doe d. Goodbehere v. Bavan*, 3 M. & S. 353. In that case, he should produce the proceedings and the assignment, by a *subpoena duces tecum* to the assignee of the term; and then, by proving the execution of it from the bankrupt's assignees to a purchaser, he proves his case. So, he may show that the lease [632] was sold \*by the sheriff under an execution against him: *Doe d. Mitchinson v. Carter*, 8 T. R. 57. In that case he should give the writ *fi. fa.* in evidence by an examined copy, and then prove, by a witness, the sale by the sheriff to some other person, and, by a *subpoena duces tecum* to that person, have the bill of sale from the sheriff, and prove the execution of it by the subscribing witness; or a *feme sole* may show they were assigned by her marriage: *Moo.* 21; *Com. D. Condition*, Q. 12; *Ves.* 187. This covenant is often "not to assign without the lessor's leave in writing, first had and obtained," in which a parol license is not good; there must be a license in writing, which must be produced and proved at the trial by a witness, to be the lessor's handwriting: *Roe d. Gregson v. Harrison*, 2 T. R. 425; 1 V. & B. 191. Under this covenant, if the lessor license deft. to alien apart, he may afterwards alien

the rest, without farther license: 4 Rep. 119; Cro. El. 116; *sed quære*. So, if a lease be made to three, upon condition that neither they, nor any one of them, shall alien, without license, and then the lessor license one, this discharges the condition as to all: 1 Rol. Ab. 472, l. 7.

*Under Plea, denying Exercising a Particular Trade.*] Under this plea, the burden of proof lies on the plt. On a covenant, restraining a tenant under lease of a house, not to follow particular trades, the court held that turning a dwelling-house into a school was a breach of such covenant: *Doe d. Bish v. Keeling*, 1 M. & S. 95. But, where the covenant was, that the deft. should not carry on any trade or business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the other tenants of the lessor, it was held, that the carrying on of the business of a publican was not a breach of the covenant. If the lessee covenant that he will not let the shop, yard, or other thing belonging to the house, to any one who shall sell coals, and will not himself sell coals there, and then he let the whole house to one who sells coals, this is a breach of the covenant: *Chinsley v. Langley*, 1 Roll. Ab. 427, l. 95. If the lessee covenant not to carry on a particular trade, without the consent of the lessor in writing, the mere fact of the lessor's suffering the tenant to carry on a trade on the premises, will not afterwards authorise his carrying on another without a written license, *Marcher v. Foundling Hospital*, 1 V. & B. 188; and giving an express *parol* license would suffice: see *Gregon v. Harrison*, *ante*, 471.

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## LEAVE AND LICENSE.

*PLEADINGS AS TO.*] In an action on the case, leave and license are generally given in evidence under the general issue, 8 East, 308, 6 B. & C.; but, in trespass, it must be pleaded specially: Vin. Ab. *License*, Com. D. *Pleader*; 3 M. 35; *Bennett v. Allcott*, 2 T. R. 166; *Taylor v. Smith*, 7 Taunt. 156; *Milman v. Dolwell*, 2 Camp. 378. In a plea, justifying the trespass by the leave of the plt., it does not appear to be necessary to enumerate, in the introductory part of it, the different acts of trespass alleged to have been committed: 2 Chit. Pl. 1106. In covenant, leave and license may be pleaded, when the plea can be substantiated by the terms in the covenant; but a *parol* license, contrary to the express terms of the covenant, is not sufficient to sustain such plea: *Littler v. Holland*, 3 T. R. 590; Co. Lit. 222, b.; *Kay v. Waghorn*, 1 Taunt. 428; 8 T. R. 280; 2 Saund. 47. The plt. may *reply* generally to a plea of license, that the deft., of his own wrong, and without the supposed license, committed the trespasses concluding to the country, 11 East, 45, 1 Saund. 103-6; but, if the plt. did license the deft. to commit some acts, or the deft. committed an excess in such case, he should reply [\*633] a revocation, or new assign the excess, or that he brought his action for other different trespasses: 1 Saund. 300, a, 2, *ib.* 5, n. 3; 3 Camp. 520. But, it seems, that, if the license only extended to some of the trespasses, and that other trespasses were committed at different times, and not covered in evidence by the license, the general replication *de injuria* will suffice: 11 East, 451; 1 Chit. Pl. 516. In actions of tres-

pass to personal property, where there have been two takings, or two injuries committed to the same property, there may be a new assignment, 6 Mod. 120; and if, in trespass for taking personal property, the deft. by his plea, made a local justification, the plt. may new assign: 1 Saund. 300, *a*.

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*Precedents.*

PLEA OF LICENSE IN TRESPASS.

And for, a further plea in this behalf, the said deft., by leave, &c., says (*actio non, &c., as post, "Pleas."*) Because he says that he, the said deft., at the said several times, when, &c., by the leave and license of the said plt., to him for that purpose first given and granted, to wit, at, &c., aforesaid, committed the said several supposed trespasses in the said declaration mentioned, as he lawfully might, for the cause aforesaid. And this, &c. (*Conclude with a verification, as post, "Pleas."*)

See plea of license in covenant, 3 Chit. Pl. 1001; replication in covenant, denying the license, *ib.*, 1185; the like in trespass, *ib.*, 1209; and replication in trespass, showing a countermand, *ib.*, 1210.

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PROOF AND EFFECT OF.] Where the fact of the license is in issue, by a denial of the license, the burden of proving such license lies upon the party asserting it. If the license is admitted by the pleading, but some fresh fact is asserted, as doing away the effect of such license, then that fact must be proved by the party asserting it: see, *ante*, 632. To prove a license, if by parol, the witness who heard it given should be subpoenaed; if by writing, the same should be produced, and the parties' handwriting to it proved. As to how far silence and acquiescence amount to a license, see, *ante*, 46-47. Where plt. in his declaration states the trespasses to have been committed on divers days and times, and the deft. pleads a license, to which the plt. replies, *de injuria absque tali causa*, the deft. must give in evidence a license co-extensive with the proof of the trespass, and that he had a license for each trespass which plt. proves: *Barnes v. Hunt*, 11 East, 451; *ante*, 632. A license may be presumed, as where an inclosure having been made for waste twelve or fourteen years, and seen by the steward of the lord, from time to time, without objection made, it was left to the jury to say, whether or not the inclosure was made by the license of the lord: *Doe v. Wilson*, 11 East, 56; 7 B. & C. 243. Old entries of license on the court-rolls of a manor are, in some cases, admissible: *Rogers v. Allen*, 1 Camp. 309, *ante*, 57, &c. A parol license to enjoy a beneficial privilege or grant of an easement, to be exercised upon the grantor's land, is within the Statute of Frauds, and void: but a parol permission to the grantee to use his own land in a way in which but for an easement of the grantor, such grantee would have a clear right to use it, is valid, and not within the act; and the grantor could not, in the latter case, retract his license without reimbursing the grantee any expense incurred in consequence of it: *Winter v. Brockwell*, 8 East, 309; *Newlins v. Shippam*, 5 B. & C. 221. Thus, a parol license to put a skylight over the deft.'s area, which impeded the light and air from coming to the plt.'s house through a window, is good: *Winter v. Brock-*

*well*, 8 East, 310; *Palm*, 71; *Sayer*, 3; *Taylor v. Waters*, 7 Taunt. 374. But a parol license to have the water flowing in a tunnel over the grantor's land is void: *Tentiman v. Smith*, 4 East, 107; *Harrison v. Parker*, 6 East, \*154; 2 Ven. 128; 6 B. & C. 703; Chit. Stat. [\*634] 372. If the deft. has expended money in consequence of having obtained the plt.'s license, the latter cannot revoke the license without tendering the expenses to the deft. *Winter v. Brockwell*, 8 East, 308, *ib.*; and, in such case, he must prove such tender: see, *post*, "*Tender*." If the plt. relies on a countermand of the license, he should be prepared to prove that fact accordingly.

A license is to be taken to justify every thing which is necessary to do that for which it was required, and not confined to the very terms of it. Therefore, a license to a man to enter and to do something which must be done by others on his account, justifies their entering to do it: *Dennett v. Grover*, Willes, 195. The keeping open the doors of a house in which there is a public billiard-room, is a license, in fact, to all persons to enter for the purpose of playing: *Ditcham v. Bond*, 3 Camp. 525. A party may justify an entry into the land of another under a license in law; as, in the case of a remainder-man, to see if there have been any waste to the prejudice of the inheritance, or by an entry of the landlord in the absence of the tenant, whose term had expired, but possession had not been given up, *Turner v. Meymott*, 1 Bing. 158; and for the purpose of executing the process of the law, or by an entry into an inn or tavern at seasonable hours. So, for breaking, &c., a man's house, and debauching his daughter, *per quod servitium amisit*, license to enter, if pleaded, is a good bar, *Bennet v. Alcot*, B. R. M. 2S G. 3, 2 T. R. 166; but entry by license of the plt.'s wife or servant, is not sufficient, R. Cro. El. 876; nor entry to take his goods, or his falcon, that pursued a pheasant there, R. 2 Rol. 567, L. 30, *vide post*, 3 M. 39; nor entry to visit his sick daughter, being servant to the plt., R. 2 Rol. 567, L. 20; or to demand his debt, if he does not say that the owner was then there, R. Cro. El. 876. Unless the license, in fact, correspond with the license given, it will not justify the trespass; as, where a person gave leave to another to show his house, for the purpose of getting a tenant, and, the key being mislaid, he entered for that purpose by the window, this was held not to be justified by the license: *Ancaster v. Milling*, 2 D. & R. 714.

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LEGACY AND LEGATEE.—See *ante*, 505, 459.

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LEGITIMACY.—See *ante*, 457-8, 474.

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LETTERS OF ADMINISTRATION.—See *ante*, 504.

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LETTERS PATENT.—[See COPY-RIGHT.]

**PLEADINGS AS TO.]** In pleading letters patent, it is first necessary to show in what estate the king was seized at the time of the grant; as

[\*635] he \*may be seized of a less estate than a fee simple: 1 Saund. 187, *n.* 1. It must also be shown *quo jure* he was seized, whether in right of his crown, duchy of Lancaster, &c. and under what seal he granted. When the consideration of the king's patent is executory, the plt., in pleading such a patent, must aver that the thing is done; Com. D. *Pleader*, C. 62; but, if the consideration be executed, it need not be averred; as, if the king grant for service done: Plow. 455, *a.* It is sufficient, where there ought to be an averment, to aver the consideration to be performed, without stating more; as if the king, in consideration of the surrender of a lease, grants, it is sufficient to aver the surrender made, without saying that there was a lease, for the surrender is a consideration: 1 Co. 43; Com. D. *Pleader*, C. 65. It is also necessary to state the grant to have been enrolled in the Court of Chancery, and to make a profert either of the grant itself, or of an exemplification thereof: 1 Saund. 189, *n.*; 2 *ib.*, 187, 271. But, where letters patent are pleaded in the same court where they are of record, they need not be pleaded with a profert, 2 Saik. 497; but, if enrolled in another court, they must be pleaded with a profert of the letters patent themselves or an exemplification: *ib.*; Com. D. *Pleader*, C. 13.

PROOF OR.] Letters patent must be proved by producing the letters patent themselves, or the exemplification of them, under the great seal, which will be sufficient evidence, without farther proof: 1 Ph. Ev. 445.

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LIBEL.—See SLANDER.

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## LIBERUM TENEMENTUM.

PLEADINGS AS TO.] In an action of trespass, *quare clausum fregit*, or an avowry in replevin, if the deft. claim an estate of freehold in the *locus in quo*, or justify as servant of a party entitled thereto, he may plead generally *liberum tenementum*, Steph. P. 334; or he may, in an action against him, give the freehold title in evidence under the general issue, not guilty, 8 T. R. 403; but, in 8 East, 400, the court held that the deft. could not justify, under the general issue, the cutting the posts and rails of another, though put upon the deft.'s own soil, and that the deft. ought to have pleaded *liberum tenementum* specially, justifying the cutting, &c. the rails, as incumbering the deft.'s land: and it is usual, and frequently advisable, to plead *liberum tenementum*, either in order to compel the plt. to new assign, setting out the abutments, 11 East, 51, 72, 1 Saund. 299, *b.*, 1 B. & C. 489, 2 D. & R. 719, *s. c.*; or, if he claim as tenant to the deft., or to the person on whose behalf the supposed trespass was committed, to compel him to set forth such tenancy, which the deft., in his rejoinder, may insist has been determined by notice to quit, &c. *Libertum tenementum* is a good plea to trespass in a uerall, or free fishery, the owner of the soil being *prima facie* owner of the fishery: 1 Chit. Pl. 440.

With respect to the *replication*, the plt. may reply according to the facts; as, where the names or abutments of the close have been so minutely

described in the declaration as to leave no question as to what close the plt. alludes to, and the plt.'s title is inconsistent with the deft.'s; as, if the plt. insist that the *locus in quo* is his freehold, or the freehold of another \*person, then the replication should deny the deft.'s title, [\*636] by replying that it is the plt.'s, or the third person's freehold, and not the deft.'s, and should conclude to the country: or the replication may merely deny that the close is the deft.'s freehold, which latter mode is proper where the plt. is not entitled to the freehold: Willes, 225; 1 B. & C. 489; 2 D. & R. 719; 1 Chit. Pl. 514. If the plt. derive title under the deft., then he must not traverse his plea, but, confessing the deft.'s title, must reply to the lease, or some other title under him, concluding with a verification: Willes, 225. If the plt. has a middle case, and neither derives a title under the deft., nor has a title inconsistent with the deft., he may reply that, before the deft. had any thing in the premises, another person was seized, and made a lease for years to a person under whom the plt. claims, stating his derivative title, without either expressly confessing or denying the deft.'s plea, and concluding with a verification: 1 Chit. Pl. 516. If the declaration does not state the name or abutments of the close, &c. with such precision as to avoid the possibility of the deft.'s having a close, &c. in the same parish, of a similar description, and the deft. has pleaded *liberum tenementum*, without describing the close, the plt. should new assign, and not take issue on the plea, for, if he were, he would fail upon the trial, if the deft. could show that any close in the same parish or place stated in the declaration was his freehold: 10 East, 80; 11 *ib.* 51.

PROOF UNDER.] On a direct issue taken upon a plea of *liberum tenementum*, or where that is set up as a defence, without pleading it, the deft. must show in evidence that the freehold is in himself, or a third person, by whose command he entered the *locus in quo*, which may be proved, either by direct evidence of title, or by the presumptive evidence of his title, or by proving sufficient acts of ownership to raise a presumption of title; as to which, see *ante*, 457. Where the plt. has declared generally for a trespass to his close in A., without naming the close, and the deft. has pleaded *liberum tenementum*, and the issue has been joined thereon, it will only be necessary for the deft. to prove a freehold in any part of A. 2 Stalk. 453, *Goodright v. Rich*, 7 T. R. 355, 1 Saund, 299, as the plt. should have new assigned: *supra*. Where the plt. names the real name of the close in his declaration, and the deft. pleads *liberum tenementum* generally, without setting out the abutments of the close, upon which issue is joined, the plt. may recover, on proving a trespass done to a close in his possession, bearing the name stated in the declaration, though the deft. may have a close in the same parish, known by the same name; and it will therefore be necessary for the plt. to new assign: *Croker v. Crompton*, 1 B. & C. 489; 2 D. & R. 719; *supra*. The plt. must prove the situation and abutments of the close, as set out in the declaration, or he will be nonsuited: B. N. P. 86. This is matter of proof by parol testimony, and should in general be proved by witnesses who know the close in question, and the bounds and situation of it. In a case where the plt. described the land as abutting on the east to land of A. B., and in fact A. B. was not the owner of that piece of land, but another person, the plt. was nonsuited: Esp. Ev. 314.

## LICENSE.—See LEAVE AND LICENSE.

[\*637]

## LIEN, DEFENCE OF.\*

PLEADINGS AS TO.] In detinue, the deft. must plead a lien specially: *Alexander v. McGowan*, sittings after M. T., 3 G. 4, per *Abbott, C. J.*, 1 Chit. Pl. 114. In trover, and other forms of action, however, he may give it in evidence under the general issue. [It seems too that a lien may be pleaded in this action. In trover for certain axletrees and iron work, there was a plea, that they were delivered to the defendant for the purpose of being wrought and repaired by him in his trade of coachmaker, and claiming a lien thereon for the work done, to which the plaintiff replied *de injuria*; held, that the plaintiff could not set up a claim to a set-off to a larger amount against the defendant's demand, unless an agreement were shown that the one demand should be set-off against the other: *Pinnock v. Harrison*, 3 Mees. & W. 532. So, in trover for watches, the plea was, that they were deposited as pledges with the defendant as a pawnbroker for monies advanced: *Nickesson v. Trotter*, 3 Mees. & W. 130.]

REQUISITES OF, AND HOW PROVED.—*General Requisites.*] Liens are general or special, and exist only three ways: either by express contract, by usage of trade, or where there is some legal relation between the parties: 1 B. & A. 582. In all liens there must be some unsatisfied demand, and this demand must be certain and liquidated: 2 East, 227; Cowp. 251; 1 Esp. Rep. 119; 15 East, 554. Liens attach equally, whether there be a stipulated price, or an implied contract to pay a reasonable price or sum, the payment of the price and the delivery of the chattel being concurrent acts: *Chace v. Westmore*, 13 East, 357. In order to create a lien, it is necessary that the party vesting it should have power so to do, see 3 Chit. Com. L. 547, and cases there cited. And there must be a complete possession of the property claimed as a lien, and if a party once part with the possession of his lien, the right of lien is gone, see *post*; such possession is a mere matter of fact, depending on the nature of such particular case, and it is for the jury to say whether the party is or is not in possession: 8 Taunt. 648; see 3 Chit. Com. L. 550. A person cannot acquire a lien by his wrongful act, and a party cannot retain a lien where he obtains possession of property without the consent of the owner, either express or implied, 7 Taunt. 278, 2 Stark. 272, 3 T. R. 787, 2 D. & R. 288; or by any fraudulent misrepresentation or concealment of facts, 1 Camp. 2, 12 *ib.* 597; or by incurring expense thereon without the owner's consent: 2 T. R. 485; 1 *ib.* 153. And, where a person obtains possession of property either expressly or impliedly intended by the owner to be detained, or capable of being detained as a lien in the first instance, he cannot afterwards detain it, 2 Stark. 273; 4 B. & A. 50; 3 M. & S. 167. Nor can a person, where property is deposited for a particular purpose, depart from his trust in neglecting to execute it, and detain it as a lien for other money due to him: 6 T. R. 258; 1 N. R. 45. In general, where the deft., claiming a lien, has entered into a special agreement, or taken another collateral security, which is inconsistent with the right of lien, and shows that he never relied on the lien, but solely upon the personal credit of his debtor,



or such other security, there he has no right to retain the property as a lien: 2 Marsh 345; 7 Taunt. 24; 2 S. N. P. 1322; 3 Chit. Com. L. 548, and cases there cited.

*General Liens.*] A general lien may arise by contract, by general usage of trade, or by particular usage.

Parties may, if they think fit, stipulate for the introduction of general liens into their dealings, but such liens are encroachments upon the common law, and the proof is, therefore, to be regarded with jealousy; *per* *Ld. Ellenb.* 7 East, 228, 9. Proof of the particular stipulation must be adduced. A livery-stable keeper may, by *express* agreement, have a lien for the keep of horses, R. & M. C. 193; but he must prove such express agreement. A person in any business may agree with another that he will not receive goods to be manufactured, or have any dealings with another, unless upon condition that he shall retain all goods, &c., for any general balance due in respect of work or business of the same kind done and transacted for the employer: 6 T. R. 14; 3 B. & P. 42. Sometimes this agreement will be implied. Thus, upon an agreement with a miller to grind quantities of corn at a stipulated price, part of which [\*638] had been ground, and delivered back in different parcels, and at different times, and the rest remained in the miller's hands, it was held that he had a right to detain the residue, under the agreement for grinding the whole: 5 M. & S. 180. The principle of this case applies to the lien of all workmen and others who have bestowed labour on a chattel under such special agreement. And this implied agreement will be raised by evidence that the *prior dealings* between the same parties took place on the footing of such an extended lien, whereby the jury might conclude that they continued to deal on the same terms: 7 East, 229. But the instances of such previous dealing must be *express and uniform*, to warrant the jury in coming to a conclusion that the parties intended to adopt such general lien into their contract: *ib.* 6 East, 258.

*Previous notice* is also sufficient to infer such a contract from; for, where an individual, or persons of any particular trade (who are not under a legal liability to the contrary,) agree not to receive goods, or perform services thereon, except subject to a lien for their general balance, and give notice to that effect, it will be binding on those who know of such notice; but it must be expressly proved that the party had knowledge of such notice, and proof of the advertisement of such in the newspapers will be insufficient: 6 East, 523, *b.*; 11 East, 144. As to sufficient proof of notice, *infra*.

A lien of this nature may be implied from the *custom or general dealings of others* engaged in the same employment; but they must be proved to be of such notoriety, so general, and of such long standing, that they might fairly be presumed to have been known and acted upon by the parties; and, where a usage is at all doubtful, it will not prevail: 7 B. & C. 212. And, in cases where the party claiming the lien is, from the nature of his trade, under a legal obligation to accept employment from any one who offers it, and, for that reason, has a right to a particular lien upon property entrusted to him in the course of his trade, the evidence of any usage for the extension of that lien to a lien for his general balance, ought to be proved by still stronger evidence than is necessary in cases where no such obligation exists: Whitaker, 32; 6 T. R. 14; 3 B. & P.

49. Where a carrier claimed a lien for his general balance, and many instances were proved in which the right had been *insisted* upon and *acquiesced in*, within ten or twelve years back, and one case in which the same had been done thirty years ago, and it was also proved that this had been the practice in the north (where the contract arose) for twenty or thirty years, it was left to the jury whether the usage was so general as to induce them to infer, that the party employing the carrier knew it, and intended to adopt it. The jury negatived the usage and right of the lien, and the K. B. refused a new trial: *Ld. Ellenb.* commenting on the instances as not being sufficiently old or numerous, the evidence as open to observation, said, "In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss, by the detention of goods of value: 7 East, 228. Evidence of this kind should be substantiated by different witnesses, having knowledge of the fact from frequent experience, persons who have known and acted upon it: *ib.*; 6 East, 523, *b.*; Chit. R. 455. "Where a general lien has been frequently proved and allowed to exist, by the usage of any particular trade, the courts will not allow the right to be afterwards disputed, or require a grant to give evidence of such usage. Thus, *attorneys* and *solicitors* have a lien on all papers in their hands, and judgments recovered, for their costs: *Ld. Kenyon*, 4 T. R. 124. But, in 8 East, 362, it is ruled that "the attorney's lien only attaches upon the balance of the costs accruing in the same cause, and that the cause is not to be split; his lien is entire, not one lien on the costs of the declaration, another upon the costs of the plea, and so forth." But, though an attorney has a general lien, as against his own client, he has [\*639] not against third persons: "and \*therefore it has been held, that when a party seeks to set-off judgments in different actions (which were cross-actions,) the attorney shall have a lien for his costs in the particular cause only:" *per Abbott, C. J. Stephens v. Watson*, 3 B. & C. 535; 5 D. & R. 399; 2 B. & C. 800; 2 B. & P. 28. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing the commission, to recover the amount of his bill: *Lambert v. Buckmaster*, 2 B. & C. 616; 5 D. & R. 399. When an attorney has to substantiate his lien in his defence to an action, he should show that he was employed by *plt.* as his attorney, also his account, and the general balance, if he claims in respect of one; and he should further prove that the papers on which he claims his lien came into his hands in the course of his professional employment, as he can retain other papers, which is sufficient, than those on which he has done a particular work: 4 Taunt. 808; 3 B. & C. 225; 4 D. & R. 621. And, where an attorney received money from his client to pay a debt to a third person, and, upon discharging the debt, he received back a lease of his client's, which was pledged to such third person, as a security for that debt, it was held to be liable to a general lien, as coming into his possession in the ordinary course of business; 1 M. & S. 242. It would seem, however, "that, where an attorney (or any person having a lien) has made an agreement to take bills for his debt, such agreement takes away the right of lien:" *p. Gibbs, C. J.*, 2 Marsh, 346. The lien would be restored if the bills were dishonoured: 1 M. & S. 544.

*Factors* have general liens, not only on the article when in their possee-

sion, but on the price of the article when sold, and, having that lien, they may enforce payment to themselves in opposition to the principal: *per Bayley, J., Hudson v. Granger*, 5 B. & A. 33; Cowp. 251; 3 B. & P. 489; 2 Burr. 936. But a factor has not a lien in respect of debts which have accrued previously to the time at which his character of factor commenced: 3 B. & P. 485., *Alvanley, C. J., diss.* *Packers*, being in the nature of factors, are also entitled to a lien for a general balance: 4 Burr. 2222; 4 Esp. C. 53. *Insurance Brokers*, have general liens on goods for balances due thereon; but this does not extend to any sub-agent employed by such brokers: 1 Burr. 493, 4; *Whitehead v. Vaughan*, Co. B. L. 566; *Parker v. Carter*, *ib.* 567; 1 East, 335; 2 *ib.* 523; 2 Camp. 219, 597; 7 T. R. 359, 360; 3 B. & P. 119. *Bankers*, also, have liens on all securities deposited with them for the balances of their general accounts: 1 Esp. Rep. 66; 1 Stark, C. 1; 5 T. R. 488; 1 B. & P. 546. *Wharfingers*, likewise, have liens for a general balance, 1 Esp. Rep. 109, 3 *ib.* 81, 15 East, 428, 1 McC. & Y. 173; but it is questionable in Hull whether they have a lien for warehouse-rent and harbourage: 7 B. & C. 212. *Calico-printers*, Co. B. L. 429, 460, 3 Esp. Rep. 268, and *fullers*, *sembl.* 8 Taunt. 499, 1 Atk. 288, 1 East, 4, have this general lien: but *dyers*, 2 Chit. Rep. 455, 4 Esp. Rep. 53, 1 W. Bl. R. 651, *sed vid.*, 6 East, 523, 8 Taunt. 499, *sembl. con.*, *millers*, 1 Atk. 235, 1 W. Bl. R. 653, and *printers*, 3 M. & S. 167, *innkeepers*, 8 Mod. 172, 1 Bulst. 207, and *carriers*, 6 T. R. 14, 3 B. & P. 44, 6 East, 25, *supra*, have not. *Printers* employed to print certain numbers, but not all consecutive ones, of an entire work, have a lien upon the copies not delivered for their general balance due for printing the whole of those numbers: 3 M. & S. 167.

To enable the above persons to establish their right of detaining property for their general balances, they must prove their acting in the above characters, and that the property came to them, and that they kept them in their possession in such respective characters. And bankers will not establish their right of detaining the goods, if it appear that the instrument was left at the banking-house by mistake, they having, on application, declined to advance money on it as a security, 7 Taunt. 292; but, it was observed by *Abbott, C. J., Bolland v. Bygrave*, R. & M. C. 273, "where it appears that bankers \*had discounted bills for a customer to a large amount, which were unpaid at the time of action brought, and had also accepted a bill for his accommodation to a large amount, not then due, I think that a banker who stands in this relation to a customer has a lien upon any securities of that customer which may, for any purpose, be placed in his hands." [\*640]

*Particular Liens.*] Such liens may be acquired by express contract, by implied contract, as by usage of trade, &c., or by legal relation.

A particular lien may be acquired in any case where the parties stipulate for it, either by parol or in writing; and it may be created, either where the goods are placed in the hands of a person for the execution of some particular purpose on them, with an express contract that they shall be considered as a pledge for the labour, &c., the execution of that purpose may occasion; or where property is merely pawned or delivered for bare custody to another, for the sole purpose of being a security for a loan made to the owner on the credit of it: Cro. Car. 271.

A particular lien may exist where there is a long-established general

usage of trade to that effect, or where there is a particular usage of trade between the parties themselves, which might, in effect, be considered as an implied contract for the lien. The existence and extent of liens created in this manner are matters of evidence: 6 T. R. 14. Where the usage is doubtful, it will not prevail: 7 B. & C. 212. And, where the wharfinger at Hull claimed a general lien for wharfage, labourage (comprising landing, weighing, and delivery, and warehouse-rent,) the claim for wharfage was admitted; but, as to the residue, upon a case, stating that in Hull such claim had, in a great majority of instances, been acquiesced in, but, in others, had been rejected, and that the right had long been, and still was, disputed there, it was held that the claim could not be supported, as the right of general lien arises out of an express or implied contract, of which the former had not been made, and the latter could not be inferred from the circumstances stated in the case: *Holderness v. Colkinson*, 7 B. & C. 212.

A particular lien may be created by legal relation in two ways: 1st, where the law throws an obligation on a party to do a particular act, and in return for which, to secure payment, it gives him such a lien, 1 Esp. Rep. 109, as in the case of common carriers, innkeepers, &c., 2 Ld. Raym. 867, 6 T. R. 17, 3 B. & P. 42, 1 Esp. Rep. 66; and, 2dly, where, from circumstances, a party has bestowed his labour and expense upon the property detained, thereby creating a moral and legal obligation on the owner of such property, to make a remuneration before he can take them away. Upon the first principle it has been held, that common carriers, 1 Ld. Raym. 867, innkeepers, *ib.*, and farriers, Yelv. 67, have a particular lien for their respective labours and expenses in regard to their particular employment: 3 Chit. Comm. L. 539. And it may be taken as a general rule, that, wherever goods are delivered to a tradesman or other person, for the execution of the purposes of his trade or occupation upon them, and he incurs expense and trouble in the execution of such purposes he has a particular lien on them: 1 Atk. 228, 235; and see the various instances pointed out in 3 Chit. Comm. L. 539 to 241.

A vendor of property has a particular lien upon it, as long as it remains in his possession, and no constructive delivery has taken place, and the vendee neglects to pay or tender the price agreed upon for it: 1 H. Bla. 363; 2 Bla. C. 448; 1 Taunt. 458; see *post*, "*Stoppage in Transitu*." Where goods came into the possession of a party by finding, and he has been at some trouble or expense in the preservation of them, as, where a party, by his own risk, labour, or expense, preserves the property of another from loss at sea, when the owner, or those entrusted with the care of them, have either abandoned or are unable to protect or secure them, he is entitled by the common law to take possession of the goods [\*641] saved, \*until a proper compensation is made to him for his trouble, 1 Ld. Raym. 393, Salk. 654, 2 H. Bl. 254, 5 Burr. 2732; but this rule only applies to cases where the property is saved from loss at sea, and not where it is saved from loss on a river or on land, *ib.*; and the finder of a horse, &c., has not a lien on it for its expenses of keep, &c.: 2 W. Bla. R. 1171; 2 H. Bla. 254; 3 Chit. Comm. L. 543.

*Lien, how waived.*] If the party, when goods are demanded of him, rests his refusal to detain them upon a *different ground*, making no mention of the lien, it will be considered as a waiver of it, 1 Camp. 410, 2

Bing. 23, 2 Stark. 272; or, if he set up a lien of a different nature from that which he proves on the trial, as in *Knight v. Harrison*, 10th Dec. 1823, MS., where the plt. brought trover, for a hundred pieces of calico; the deft. was commission-agent at Manchester, and bought, as agent of Moravia and Co., in London, of plts., at Manchester, 1500 pieces of calico, to be paid for by bill drawn by plt. on Moravia and Co. These were delivered to deft. on the 2d October; on the 4th of October, Moravia and Co. stopped payment; plts. applied to deft. to have the goods then in his hands; deft. *at first promised to return them*, they not having been drawn for, but afterwards he said he would not deliver them, as it was doubtful whether he could safely do so. Plts. obtained an order on Moravia, and showed the order to deft., on which he said he would not give up the goods until Moravia and Co. had paid his general balance, the amount of which he did not state; plts. demanded and tendered an indemnity, but deft. refused to accept it, and plt. brought this action; for the deft., it was contended that he had a general lien for his whole balance; 2dly, That he had a lien for £49, expenses, incurred by deft. in getting the goods glazed, &c.; but Abbott, C. J., said, "He has no lien for his general balance as against the plts., as, at the time of the demand, he insisted on having his general balance, and did not name his particular lien, but made too large a claim; he is precluded from now setting it up, for, if he had relied upon that at the time, it is most probable plt. would have paid it; and, as I have no doubt, I will not reserve the point." Verdict for plt. £825. Where the parties contract for a different time or mode of payment, it is also a waiver, and destroys his right of lien, the detention of the property in such case being inconsistent with the contract: *ib.* So, where the owner of a ship, having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods: *Horncastle v. Farren*, 3 B. & A. 497; 2 Marsh. 343; 1 M. & S. 544.

*When revived.*] Where a party has given up possession and lost his lien, he cannot revive it by stopping the goods *in transitu*, 1 East, 4, 1 Stark. 408; 3 B. & P. 485, 2 D. & R. 288; and, where the seller parts with goods, he loses his lien; 1 Str. 566. But where goods, which have been subjected to a general lien, have been parted with, if they once return into the same possession in the course of dealing, the lien will be restored, because, as the right would attach upon any fresh goods coming into possession, which is the character of a general lien, there seems to be no reason why it should not equally attach upon the same goods back again: Paley, Prin. & A. 107. And where a policy-broker, who had a general lien on the policy of insurance, had parted with it, afterwards regained possession of it, it was held that his lien thereby revived: 2 Moo. 34; 3 Chit. Comm. L. 558.

## LIMITATIONS, STATUTE OF.

PLEADINGS AS TO, 642-3.

PRECEDENTS, 644.

EFFECT OF, IN GENERAL.—*Enactment of 21 Jac. 1, and 4 Anne, c. 16, 644.—To what Cases they extend, 645.—When Statute begins to run, ib.—Exception as to Merchants' Accounts, 646.—How the demand may be revived by Acknowledgment or Promise, 647.—Nature of Acknowledgment or Promise, and by whom made, &c. ib.*

PLEADINGS AS TO, DECLARATION.] In actions to recover a debt after the lapse of six years, and where a promise has been raised by implication from a subsequent acknowledgment, "the declaration must sometimes be so framed as to agree with the acknowledgment; and, therefore, in an action by an executor, upon promises to the testator in his life-time, it is not sufficient, in answer to a plea of the Statute of Limitations, to give in evidence an acknowledgment to the executor within six years," *p. Bayley, J.*: and this would apply where an attorney or agent has made a subsequent promise to make satisfaction to the plt. for costs, in consequence of his negligence: 3 B. & A. 626; 5 Moo. 105; 2 B. & B. 75. It is often advisable, in actions at the suit of an executor, or the assignee of a bankrupt, that counts should be inserted in the declaration, laying the promise to the plt., in his representative character; however, it should be stated that "the cause of action accrued to plt. on a matter arising in the time of the testator, as, that the deft. accounted with him as executor concerning sums due from the deft. to the testator," or he will be liable to costs: 1 Bing. 253-4; 8 Moo. 146. If the plt. declares on promises to the testator or bankrupt alone, a promise to the executor or assignee could not be given in evidence: 3 East, 409; 6 Taunt. 210; 1 B. & C. 249-251; 2 D. & R. 368-370. In assumpsit against husband and wife and A., the declaration alleging a promise by A. and wife before marriage, proving a promise by A. after marriage, she having been married more than six years, will not sustain the issue under the plea of *actio non accrevit*: 1 B. & C. 248; 2 D. & R. 369. However, in the common cases of acknowledgments, the law raises by implication the same promise as that stated in the declaration, 3 B. & A. 631, 1 Taunt. 212; and, therefore, the declaration merely states the original promise, as in cases where the statute does not apply, *Upton v. Else*, 12 Moo. 303: and the plt. may prove his debt under the account stated, whenever there is a sufficient acknowledgment: 16 East, 423.

*Plea.*] If the deft. rely on the statute, he must plead it specially: 1 Vent. 191, 1 Lev. 110, although it should appear on the face of the declaration that the cause of action did not arise within six years, as it forms no defence under the general issue, 2 Saund. 63, (6,) Salk. 278, 1 Ld. Raym. 153, 838; however, it seems that, after a considerable lapse of time, the jury may presume payment, and Dallas, C. J., in 2 Stark. R. 497, left it to the jury, after a lapse of thirteen years; and, on a note, due more than twenty years, *Ellenborough, C. J.*, held plt. could not recover,

as the same rule of presumption of payment raised on deeds after a lapse of twenty years, would apply, 5 Esp. Rep. 52; see *post*; but see, 1 D. & R. 19. In debt, "it has been held, that, as the plea [\*643] of *nil debet* is in the present tense, the statute may be given in evidence under it: 1 Salk. 278; *sed quære*, 1 Saund. 283, *n.* 2. The statute must be pleaded specially in trespass or case: 2 Saund. 63, *n.* b.; 6 East, 390.

The plea that the *causes of action* did not *accrue* within six years, is the best form, and may be adopted with safety in all cases, as the statute operates as a bar only from the *time the cause of action arose*; and it is the only form applicable to the cases of actions brought for breach of promises, founded on collateral and executory considerations, whereon a cause of action does not immediately accrue on making the promise, Selw. N. P. 135, as in actions, upon promises to pay money, 3 B. & R. 288, 2 Ld. Raym. 838, or to do any act at a future period, &c.: 2 Taunt. 323, Saund. 33, *n.* (2;); 283, *n.* (2;); 2 Saund. 63, (6.) But, if the assignee of a bankrupt declare that the debt. was indebted to the bankrupt, and promised *plt.* to pay, this plea would be no answer, and is bad on demurrer: 2 Str. 919; see, also, 2 H. B. 561. This is the necessary form in an action for a tort, where the cause of action does not arise immediately on the tort being committed, but from some consequence of such tort, see 3 B. & A. 448; where the plea of "not guilty within six years" was held bad. It may be pleaded with the general issue, and any other plea. In *assumpsit* on several promises in different counts, if the debt. plead the Statute of Limitations to the whole, and it is a bad plea as to one of the counts, it will also be insufficient as to the residue: 1 Lev. 48.

*Replication.*] Where the Statute of Limitations is pleaded, the *plt.* may reply either that the debt. did undertake, or that the cause of action did accrue within six years, in the negative of the words of the plea: see 5 B. & A. 215-216. *Plt.* should reply that the writ in the action issued, within six years, when the time of issuing the writ is material. Thus, if the cause of action accrued within six years before the issuing of the writ, but not before the day of which the declaration is entitled, and the debt. plead that the statute ran "before the exhibiting of the *plt.*'s bill," the *plt.* should not traverse the plea, but show the issuing of the writ, as the production thereof would not negative the plea; see form in 3 Chit. Pl. 1161; 5 B. & A. 453; but, if the debt. in his plea aver that the causes of action did not accrue within six years "before the commencement of the suit," a denial of the plea seems sufficient, 5 B. & A. 452, 1 D. & R. 27, *s. c.*; when continued process is pleaded, the first writ must be shown to have been returned: 2 Saund. 63; 7 T. R. 7; 6 *ib.* 617. The exceptions to the statute, as that *plt.* was abroad, (see form in 3 Chit. Pl. 1161;) that the debt or account were due between merchants, 6 T. R. 193, 2 Saund. 124, &c., 3 Wils. 79, or infancy, 2 Saund. 118, Lutw. 243, may be replied. Fraud cannot be set up as an answer to the statute, if the replication contain a mere traverse of the plea: *Clark v. Hougham*, 2 B. & C. 149; 3 D. & R. 322. As to replications in actions at the suit of executors, see 1 Salk. 282, 2 Ld. Raym. 1101, 6 Mod. 309, *s. c.*, B. N. P. 150, 1 Tidd. 21, 3 East, 409, 2 Saund. 68, &c.; in actions against husband and wife, 1 B. & C. 248, 2 D. & R. 863, Tidd. 1250. And, if the *plt.* rely on fraud in debt., it must be specially replied. It is a rule, that

an entire replication bad in part is bad for the whole; as, if to a plea of the Statute of Limitations to two counts of a declaration, the plt. should reply, that the accounts were between the plt. and deft., as merchants, if his replication should be bad as to one of the counts, it is bad also to the other: Com. D. *Pleader*, F. 25; 3 T. R. 376; 1 Saund. 28, n. 3; 2 Saund. 127. Where the Statute of Limitations is pleaded in an action of trespass, or on the case, or in trover, the replications will be similar to those in assumpsit: 1 Chit. Pl. 510.

[\*644]

\**Precedents.*

## PLEA THAT CAUSE OF ACTION DID NOT ACCRUE WITHIN SIX YEARS.

(*Actio non, as post*.) "*Plea.*" Because he says that the said several supposed causes of action in the said declaration mentioned did not, nor did any or either of them, accrue to the said plt. at any time within six years next before the exhibiting of the bill of the said plt. against him, the said deft., in this behalf (or, if in C. P., or by original, say, "next before the commencement of this suit,") in manner and form as the said plt. hath above thereof complained against him, the said deft. And this, &c. (*Conclude with a verification, as post, "Pleas."*)

This form may be used in other actions. See form of non-assumpsit within the six years, 3 Chit. Pl. 940; in case, *ib.*, 1030; in trespass, *ib.*, 1067.

## REPLICATION THAT CAUSE OF ACTION DID ACCRUE.

(*Precludi non, as post, "Replication."*) Because he saith that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to him, the said plt., within six years next before the exhibiting of the said bill of him, the said plt. (or, "next before the commencement of this suit," as in the plea,) in manner and form as he, the said plt., hath above complained against the said deft., to wit, at, &c., aforesaid. And this he, the said plt., prays may be inquired of by the country, &c.

## REPLICATION THAT A WRIT WAS SUED OUT WITHIN SIX YEARS.

(*Precludi non, as post, "Replication."*) Because he saith that, within six years next after the said several causes of action in the said declaration mentioned, accrued, and each and every of them did accrue, to the said plt., to wit, on, &c. (*Here state the issuing of the process out of R. B., C. P., or Exchequer, and the proceedings thereon, and the purpose for which they were issued, as in the replications to the pleas of tender, post, "Tender:" and then proceed as follows:*) And the said plt. further saith, that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said plt., within six years next before the issuing of the said first-mentioned precept (or "writ") out of the said court of our said lord the king, here in manner and form as the said plt. hath above thereof complained against the said deft. And this, &c. (*Conclude with a verification, as post, "Replication."*)

See replications of continued writs issued, 3 Chit. Pl. 1161; that plt. was abroad, *ib.*; that deft. was abroad, *ib.*, 1162; and other replications. See replication of Statute of Limitations to a plea of set-off, *ib.*, 1159.

See form of rejoinder that no cause of action accrued within six years of issuing of writ, 3 Chit. Pl. 1223; showing at trial time of issuing writ, *ib.*, 1224; denying record of writ, *ib.*; traversing intent of issuing writ, *ib.*; that action was not commenced within six years of deft.'s return, *ib.*

*Evidence.*

[*Enactment of 21 Jac. 1, c. 16, s. 3.*] By this statute it is enacted, that "all actions of trespass, *quare clausum fregit*, &c., detinue, trover, and



replevin, for taking away goods or cattle; all actions of account and upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants;) all actions of debt, grounded upon any lending, or contract without specialty, or for arrearages of rent; and all actions of assault, menace, battery, wounding, and imprisonment, shall be commenced and sued within the times hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, account, trespass, *quare clausum fregit*, &c., debt, detinue, and replevin, within six years next after the cause of such actions or suit, and not after actions of "assault, bat- [\*645] tery, wounding, or imprisonment, within four years; and actions upon the case for words, within two years next after the words spoken, and not after."

The seventh section enacts, that "if a person entitled to any such action be, at the time the cause of an action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, he may sue within six years from the time such impediment shall be removed. And the stat. 4 Anne, c. 16, s. 19, enables a creditor to sue his debtor, who was abroad when the cause of action accrued within six years after such debtor's return to this country.

*To what Cases it extends.]* The operation of this act is confined to the particular actions therein mentioned, and does not extend to actions of debt on bonds, and other specialties, 1 Saund. 282, *ib.* 66, Bac. Ab. *Limit. D.* 2, 4; nor does it extend to actions of annuity or of account, concerning the trade of merchants: *ib.* It extends to all actions upon a written or parol contract, *ib.*, Bac. Ab. *Limit. D.* 2, 4; or on a bill of exchange, Carth. 3; or for attorney's fees, 3 Lev. 367; or to an action for rent on a parol demise: *Leigh v. Thompson*, 1 B. & A. 625.

*When the Statute begins to run.]* In assumpsit, the statute begins to run not from the time when the *damage* results from the breach of the promise, but the time when the breach of promise takes place: *Short v. McCarthey*, 3 B. & A. 626; *Battley v. Faulkner*, *ib.* 288; *Brown v. Howard*, 2 B. & B. 75. It appears that there is not any substantial distinction between an action of assumpsit founded upon a promise, which the law implies, that a party will do that which he is legally liable to perform, and an action on the case, which is founded expressly upon a breach of duty. Whatever be the form of action, the breach of duty is substantially the cause of action; and the statute is a bar to the original cause of action, and to all the consequential damages resulting from it, unless it can be shown that those damages, or any part of them, constitute a new cause of action, which accrued within six years, *Howell v. Young*, 5 B. & C. 266, 2 Car. & P. 238, 1 Salk. 11, *Gillon v. Boddington*, R. & M. 161, 2 H. Bl. 14; and, in such case, the allegation of special damage is a mere explanation of the manner in which the misconduct of the deft. (which is the cause of action) has become injurious to plt.; but, if the *special damage* be of itself a cause of action, it would be otherwise: *Parker v. Baylis*, 2 B. & B. 75; *Brown v. Howard*, 4 Moo. 512; 3 P. W. 143. Each continuance of a nuisance constitutes a fresh cause of action; and, where the defts. undermine a wall, but which does not fall till three months, that being the *gravamen*, or cause of action, the limitation runs

from such event: *Roberts v. Read*, 16 East, 215; R. & M. 161. The effect of fraud practised by deft. seems to have been, however, subject to some doubt; but it would seem, that though the statute was a bar where the fraud was complete more than six years before the action brought, yet that, where the party had been active in correcting the original fraud within that time, such act would be a sufficient ground to avoid the stat.: *Clark v. Hougham*, 2 B. & C. 153-6; D. & R. 322; Doug. 654; 1 Bligh. 315.

The statute begins to run as soon as there is a complete cause of action, and not from the time of making the contract or promise; as, where a party contracts to pay a sum of money at a future period, or on the happening of a certain event, as on the marriage of J. S., the cause of action only accruing on the arrival of such time or event, the statute does not, till then, begin to operate, *Fenton v. Emblers*, 1 W. Bl. R. 353-4, *Shutford v. Borough*, Godb. 437: thus, on a bill payable at a future time, the statute runs from such time, and not from date of bill; and, if a note be payable a month after sight, the statute operates only from the [\*646] expiration of a month after presentment: \*2 Taunt. 323; and see 1 R. & M. 388; Chit. B. 373. And, where a demand or notice is necessary, the statute only runs from the making thereof. Thus, if goods be consigned to a factor for sale, a demand of account must be made, and an action will not lie till such demand; the statute, therefore, begins to operate only from the time of such demand: *Topham v. Brad-dick*, 1 Taunt. 572.

If the plt. be abroad at the time when the cause of action accrues, the statute will not begin to run till his return, *Rochechilt v. Leibman*, 2 Str. 836, Fitzb. 81, s. c.; and he still has six years after his coming hither to bring his action, 3 Wils. 145, *Strithorst v. Græme*, 2 Bl. R. 723: and, if he never come, his right is still unbarred by the statute, and so is that of his executors and administrators: see *ante*, 642; and foreigners receive the same advantage of this clause as natives, 2 W. Bl. R. 723, 3 Wils. 145, s. c.: but, if he be in England when the cause of action accrues, though he afterwards go abroad, the statute begins to run, as in other cases: 1 Wils. 134. If one of several plts. be in England, they must sue within the six years: *Perry v. Jackson*, 4 T. R. 516. Scotland is not considered as beyond sea, *King v. Walker*, 1 Bl. R. 286, but Ireland is: 1 Show, 91. The 4 Anne, c. 16, s. 16, as we have seen, extends the exception in the 21 Jac. 1, to cases where the deft. is beyond the seas; and, by virtue of that act, a right inures to the plt. for six years "after deft.'s return from beyond the seas." Therefore, where the deft. was in the East Indies, when the cause of action accrued, it was held that plt. might sue him within six years after his return to England: *Williams v. Jones*, 13 East, 439: see *Plummer v. Woodburne*, 4 B. & C. 625; 7 D. & R. 25.

If the six years have not expired before the death of the testator or intestate, the executor or administrator may sue at any time within a year after his death; but, if the six years have expired, the statute is a final bar, and cannot be avoided: *Rex v. Morrall*, 6 Price, 30; B. N. P. 150. If, however, an action has been commenced by the testator or intestate within six years, the executor or administrator shall have a reasonable time after death to sue, to avoid the statute, although the six years may then have elapsed: 1 Selw. N. P. 144, n. 94. And, if the executor bring an

action, and die before judgment, his executor may bring a fresh action within a reasonable time: Cowp. 738. The statute begins to run from the time of granting letters of administration, as it cannot be said a cause of action exists, unless there be also a person in existence capable of suing: *Murray v. East Ind. Comp.* 5 B. & A. 204.

*Exception as to Merchants' Accounts.*] This exception extends only to mutual accounts, which are current or open, and not to accounts stated between them, 1 Mod. 70, 1 Vent. 89, 1 Lev. 298; but, if the account be running for twenty years, it is excepted, *ib.*; but, if once stated, the statute operates, 2 Mod. 311-2, unless parties continue to deal, &c.: *ib.* Actions of assumpsit, as well as account, are included. This exception is not confined to mere merchants, *Cranch v. Kirkman*, Pea. Rep. 121; and the case of *Sherman v. Withers*, Chan. C. 152, is not law, 2 Saund. 27. And, where there are mutual accounts (though not merchants' accounts,) for any item of which credit has been given within six years, this is evidence of an acknowledgment of the accounts being open, and sufficient to raise a promise to pay the balance, so as to avoid the statute, *Catling v. Scoulding*, 6 T. R. 189, S. N. P. 140; this extends only to mutual accounts; and, *per Dennison, J.*, in *Cotes v. Harris*, B. N. P. 149, "where all the items are on one side, as in an account between a tradesman and his customer, the last item which happens to be within six years shall not draw after it those that are of a longer standing:" cited S. N. P. 140. See a learned and copious note on the subject, 2 Saund. 126, (6.)

*\*How the demand may be revived by Acknowledgment or [\*647] Promise.*] In assumpsit it has been holden, that although six years have elapsed since the debt was contracted, if the debtor *promises to pay* it within six years, the statute does not attach, because the promise founded on the existing debt (which is a sufficient moral consideration) gives a new cause of action; this doctrine seems most conformable, not only to the obvious meaning of the statute, but most reconcilable with the pleadings and the weight of authorities on the subject.

*Nature of Acknowledgment or Promise.*] An unequivocal promise to pay the claim clearly takes the case out of the act. An express *acknowledgment* of the debt would, perhaps, 1 Ld. Raym. 421, always be sufficient to infer a promise to pay, or evidence of a promise, unless it were accompanied with a direct refusal, or something said at the time to repel the inference of a promise: 3 Bing. 329. The acknowledgment must be such as will afford some evidence that the party intended to pay: *Pittam v. Foster*, 1 B. & C. 250; 2 D. & R. 363; *Owen v. Wooley*, B. N. P. 148; *Trueman v. Fenton*, Cowp. 548. In *Clark v. Hougham*, 2 B. & C. 154, it is said, "wherever it appears, by the acknowledgment of the party, that it is not paid, that takes the case out of the statute;" and see *Leaper v. Tatton*, 16 East, 420, *Douthwait v. Tibbutt*, 5 M. & S. 75; and, according to those cases, it makes no difference whether the promise be accompanied by a promise or refusal. In conformity with this doctrine, it has been held, that an acknowledgment of the debt, after commencement of the action, would take it out of the statute: *Yea v. Fouraker*, 2 Burr. 1099.

A conditional or qualified promise will suffice, and evidence on the part

of the plt. will be allowed, to rebut such condition or qualification, in cases where the deft. states that the debt was discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly that it is impossible it could be discharged in any other manner than that specified: *Beale v. Nind*, 4 B. & A. 568; *Davis v. Smith*, 4 Esp. Rep. 36. A promise to pay when able, is sufficient, on proof of ability: *ib.*; *Tanner v. Smart*, 6 B. & C. 603. Where the deft. promises to pay the debt by instalments, if time be given, no proof of the time being given need be adduced: *Thompson v. Osborne*, 2 Stark. 98; *Campbell v. Sewell*, 1 Chit. Rep. 609. So, where the deft. said he would pay if others did so, proof that they had done so was held unnecessary: *Delamainer v. Winteringham*, 4 Camp. 185.

The acknowledgment is not sufficient, if it merely import that the claim is unsatisfied, without admitting that it ever existed, and, *a fortiori*, it is inoperative, if the deft. dispute that he ever was liable. It must appear, and be acknowledged, that there was an original demand: Chit. Cont. 319; *Reiocroft v. Lomas*, 4 M. & S. 457. A qualified admission by a party who relies on an objection which would, at any time, have exempted him from payment, does not take a case out of the act: *Delatorre v. Barclay*, 1 Stark. 7; *A'Court v. Cross*, 3 Bing. 329; *Cory v. Bretton*, 4 C. & P. 462. It seems, also, that if a party acknowledge that the debt *once* existed, but at the same time assert that it has been paid or discharged, or that there is an adequate set-off against it, the statute is not defeated: *Swann v. Sowell*, 2 B. & A. 759; *sed vide Boydell v. Drummond*, 2 Camp. 161; *Craig v. Cox*, Holt, 381.

A part payment of the demand will revive the debtor's liability to the remainder: see Dougl. 650. But, by 9 G. 4, c. 14, s. 3, it is enacted, "that no indorsement or memorandum of any payment, written or made, after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of statute."

[\*648] As \*to payment of money into court, see *post*, "*Money, Payment of into Court.*"

In all cases where the terms used by the deft. are ambiguous, it is a question for a jury to determine whether they amount to a sufficient acknowledgment: *Lloyd v. Maund*, 2 T. R. 760; *Rucker v. Sir S. Han- nay*, cited 4 East, 604, n.; *Frost v. Bengough*, 1 Bing. 266.

*Acknowledgment or Promise must be in Writing.*] By the late important act, 9 G. 4, c. 14, s. 1, it is enacted, "that in actions in debt or upon the case, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new, or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby, and that, where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments; or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, made and signed by any other

or others of them, provided always that nothing herein contained shall alter or take away, or lessen the effect of any *payment* of any principal or *interest* made by any person whatsoever; provided also, that in actions to be commenced against any two or more of such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plt., though barred by either of the said recited acts, or this act, as to one or more such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defts., by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed, for the plt. as to such deft. or defts., against whom he shall recover, and for the other deft. or defts. against the plt.:" see the third section as to intersements of payment. Before this act, not only a *verbal* promise to pay the debt, but a mere acknowledgment, would take the case out of the act, not only against the party making it, but also against his co-contractor, 2 Saund. 63, though, indeed, such promise or acknowledgment would not affect the executor of a contractor: *Atkins & others v. Tredgold & others*, 2 B. & C. 29; and the clause that "no acknowledgment shall be deemed sufficient evidence of a new or continuing contract, unless such acknowledgment be in writing and signed by the party chargeable," has a retrospective operation, and applies to a parol acknowledgment made before the provisions of the statute came into effect, although the acknowledgment was made before the passing of the act, *Towler v. Chatterton*, 3 Moo. & P. 619. The payment of *interest* within six years by one of the makers of a joint and several promissory note, more than six years old, will take the case out of the statute of limitations, as against the other maker of the note: and the stat. 9 Geo. 4, c. 14, has not altered the law in this respect, *Chippendale v. Thurston*, 4 C. & P. 98; and where an administratrix sued for a debt due to the intestate, and it appeared, that the debt accrued more than six years before the commencement of the action; but that within six years the defendant and the agent of the administratrix went through the account together, and struck a balance, which the deft. promised to pay as soon as he could, it was held, that the administratrix was entitled to recover on a count upon an account stated with her, and that the objection, that there was no promise or acknowledgment in writing, was not available: *Smith adm. v. Forty*, 4 C. & P. 126.

*To whom Promise or Acknowledgment should be made.*] It is not necessary, to take the case out of the act, that the acknowledgment be made to plt. himself, or even with a reference to the particular suit. An acknowledgment to a mere stranger, or third person, is sufficient to raise a promise: *Clark v. Hougham*, 2 B. & C. 154; *Mountstephen v. Brook*, 3 B. & A. 141. So, where deft. said, with reference to another action. I must pay *Mr. Peters* first, then I will pay you, this was held sufficient in an action at the suit of *Mr. Peters*: *Peters v. Brown*, 4 Esp. Rep. 46. And therefore where A., by a misrepresentation, received of B., and several other of his tenants, different sums of money, and when B. applied to him, saying that he and the other tenants had, through misrepresentation, paid more than was due, and A. replied, that if there was any mistake it should be rectified, it was held, that this obviated the statute, as well to the other tenants as to A.: 2 B. & C. 149. The acknowledgment however, when made to a third person must be sufficiently connected with the debt sought

to be recovered to satisfy a jury that it applies to the particular claim made by the plaintiff, who is bound to show that it does, affirmatively, apply to the particular debt, *Fearn v. Lewis*, 4 C. & P. 173.

*By whom Promise or Acknowledgment should be made.*] It is not necessary deft. himself should make the acknowledgment: one, by an authorized agent, is sufficient to take the case out of the statute, *Bust v. Palmer*, 4 Esp. Rep. 145; and on this principle it has been held, that where plt. relied on a new promise made by the wife, who managed the business, and generally gave orders and paid for goods, that her [\*649] promise was \*binding on her husband, and would take the case out of the statute: *Palethorp v. Furnish*, 2 Esp. Rep. 511. And, in an action against husband, for goods supplied to his wife while she lived apart, but he occasionally visited her, her acknowledgment is sufficient, *Gregory v. Parker*, 1 Camp. 394, *Pittam v. Foster*, 4 B. & C. 248, 3 D. & R. 22; and if deft. refers plt. to a third person, he is bound by such third person, *Williams v. Innes*, 1 Camp. 364, 366, n.; or, perhaps, by an admission made by his counsel at the trial, in deft's hearing: *Colledge v. Horn*, 3 Bing. 119. An acknowledgment by one of several joint debtors was formerly sufficient to take the case out of the act; but now, by the 9 G. 4, c. 14, as we have seen, the promise or acknowledgment by one or more of two joint contractors, is not sufficient to bind the rest: *ante*, 648. The principle on which this was decided is, as laid down by *Lord Mansfield*, Doug. 682, that "payment by one is payment by all, the one acting *virtually as agent for the rest*; and, in the same manner, an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due:" see also, *Perham v. Raynal*, 2 Bing. 309. Therefore, an acknowledgment by one of several makers of a joint and several promissory note, has been holden to be sufficient to take it out of the statute, as to the others, and may be given in evidence in a separate action, *ib.*; and that, too, where the other was only a surety, 2 Bing. 306; so an admission after dissolution of partnership: 1 Taunt. 104. But an acknowledgment by one of several joint contractors must be explicit and positive, to have the effect of binding the others; and it is not sufficient to show a general payment by a joint maker of the note to the payee within the six years, so as to throw it on the deft. to prove that it was not made on the note: *Holmes v. Green*, 1 Stark. 488. And so where one of the joint and several makers became a bankrupt, it was held that the payment of the last dividend within six years was a sufficient acknowledgment as to the other joint makers: 2 H. Bl. 940. The propriety of this case was doubted by *Ld. Ellenb.* and *Bayley, J.*, in *Brandram v. Wharton*, 1 B. & A. 468, on the ground that the acknowledgment, besides being a constructive one, was made by the assignee, who never could be called upon for contribution also: *Atkins v. Tredgold*, 2 B. & C. 27. And so, in an action against A., on the joint and several note of himself and B., it was holden, that a letter written by A. to B., desiring him to settle the money, took it out of the statute, *Halliday v. Ward*, 3 Camp. 32, and that the court would not go beyond that case; therefore, where one of two joint drawers of a bill became bankrupt, and under his commission, the indorsees proved a debt (beyond the amount of the bill) for goods sold, and they exhibited the bill as a security which they held for their debt, in an action by them against the solvent partner, it was held that the statute was a good

defence, although the dividend had been paid by the assignees of the bankrupt partner within six years: *ib.* After the death of one of several joint, or, joint and several contractors, his executors cannot be prejudiced, or rendered liable after the lapse of six years, by any admission or partial payment by the surviving contractors: 2 B. & C. 23; 3 D. & R. 206, *s. c.*

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LITERARY PROPERTY.—See COPYRIGHT.

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LODGINGS.—See BOARD AND LODGINGS, *ante*, 319, and *ante*, 465.

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\*LUNACY.

[\*650]

PLEADINGS, &c., AS TO.] For a cause of action arising to a lunatic, the action should be brought in his name, and not in that of his committee: 2 Sid. 1245. The deft. may give lunacy in evidence under the general issue, 2 Str. 1104; even on a specialty, where *non est factum* is pleaded, 3 Camp. 126, 2 Bl. C. 291. He is, however, at liberty to plead it specially: 1 Chit. Pl. 420. Though an idiot should appear in person, yet a lunatic, or one who becomes *non compos mentis*, must appear by guardian, if he be within age, and by attorney, if he is of full age: 4 Co. 124; 1 Chit. Pl. 469.

EFFECT OF.] Though a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit: Hob. 134. It would seem, where a lunatic is under actual restraint, or is sued on the mere ground of the contract itself, that his lunacy may be given in evidence to defeat the action, as he would not be considered as bound by contracts in the ordinary meaning of the term, 2 C. & P. 179; but, in an action on an executed contract for necessities, where the lunatic has been at large in the world, and has been supplied with necessities, &c., suitable to his rank, and no imposition practised, and has been in the habit of conducting his ordinary affairs, his lunacy is no defence, even though an inquisition of lunacy have found that he was *non compos* at the time: *Baxter v. Lord Portsmouth*, 5 B. & C. 172.

PROOF OF AS TO.] The lunacy and restraint may be proved by medical attendants, or other persons of competent knowledge, who are acquainted with the lunatic, or by proving the inquisition, as in the case of inquisitions *post mortem*, and which may be rebutted by contrary evidence: 2 Atk. 412; *ante*, "Inquisition." It will be necessary, when the party is at large, to show that some advantage was taken, or that the action is brought for recovery for what was unsuitable to deft.'s rank in life: *ib.* Where a party was sane at the time the contract was made, evidence of previous or subsequent insanity is immaterial: however, if the case were doubtful, it would be sufficient to create a suspicion of

insanity at the time the agreement was entered into: 1 Dow, 177. It should be shown that the party is *non compos*; for, if he be merely proved to be of weak intellect, it will be insufficient: 3 P. W. 129.

A lunatic may be admitted to give evidence during a lucid interval: *Bac. Ab. Ev. A.*

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MAGISTRATES.—See JUSTICE OF PEACE.

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[\*651] \*MALICIOUS ARREST AND PROSECUTION.

FORM OF REMEDY FOR, 651.

FORM OF PLEADINGS.—*In Action for Malicious Arrest, 651 to 653.—In Action for Malicious Prosecution, 653 to 655.*

PRECEDENTS, 655.

EVIDENCE IN ACTION FOR MALICIOUS ARREST.—*Issuing of Writ, and other Proceedings, 657.—Arrest, or giving Bail, ib.—Termination of former Suit, 658.—Damages, ib.—Competency of Witnesses, 660.*

EVIDENCE IN ACTION FOR MALICIOUS PROSECUTION.—*Inducement, 661.—The Proceedings taken against Plaintiff, ib.—The Termination of the Charge, 662.—The Defendants being Prosecutor, ib.—Malice, ib.—Want of Probable cause, 663.—Damages, ib.*

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*Form of Remedy.*

WHENEVER an injury to a person or his property is occasioned by a regular process of a court of competent jurisdiction, maliciously adopted, the remedy is by an action on the case, and trespass does not lie: 3 T. R. 185; 1 *ib.* 535; 3 Esp. Rep. 135; 11 East, 297; 1 Camp. 295; 2 Chit. Rep. 304; 1 D. & R. 97. But trespass may be supported where the court has no jurisdiction, and case is a concurrent remedy therewith, if the proceedings be also malicious and unfounded: 2 Wils. 302. If, however, the *proceedings were irregular*, the remedy should be in trespass: 2 T. R. 225; and see *ante*, 613, as to actions against justices. Where a party is arrested without a sufficient probable cause of action, either because no debt is due, or that he is held to bail for too large a sum, as for the *penalty* of a bond: 1 Saund. 58, *a.*, or because he is detained in custody after a sufficient tender of debt and costs, &c., 5 T. R. 185, 2 Wils. 306, 4 B. & C. 26, 6 D. & R. 129, or because the plt. in an action adopts an irregular proceeding, as issuing a second *fi. fa.* pending the first, Hob. 205, 266, 1 Brownl. 12, his remedy is by an action on the case; but, where there was sufficient cause to warrant the exercise of a legal remedy, though the person be actuated by motives of personal malice, no action lies against him: 1 Salk. 14. Therefore, it has been decided, that an action on the case to recover damages against the lessor of the plt., in a vexatious ejectment, is not maintainable: 1 B. & P. 205.



[The court will always discharge a married woman from arrest, unless, at the entering into the contract, she represented herself to be a single woman: *Hollingsdale v. Lloyd*, 3 Mees. & W. 416.]

Arrest upon *mesne* process, except in certain cases, is abolished in England, and remedies of creditors against the property of debtors extended, by 1st and 2d Victoria, C. 110.]

### *Form of Pleadings.*

*In Action for MALICIOUS ARREST.*] The venue is transitory. It is not necessary to commence the declaration by stating the law that a deft. cannot be arrested for a debt under £20. It must be stated that deft. had no reasonable or probable cause whatever for the arrest: 1 T. R. 544; 2 *ib.* 231. In 1 Salk. 15, it is said the plt. should allege how much is due; *sed quære*: at all events, the present form of declaring is not so. It has been considered sufficient, in an action for a malicious arrest for too much, where there was a set-off, to aver that the deft., "not having any reasonable or probable cause of action whatsoever against the plt., to the amount of the money for which deft. arrested plt.:" *Austin v. Debnam*, 3 B. & C. 4 D. & R. 653, *s. c.* *Quære*, whether, in such action, the declaration ought not to aver the *scienter* of the set-off, or that the deft. had not "cause of action to the amount for" [\*652] which he could arrest: see 2 Wils. 302. Sometimes the form is to aver, that the deft. had no cause of action to the amount of £20, or upwards; but, when there was a debt to that amount, and the arrest has been for too much; this would not be so correct as the other form: 1 Camp. 295.

The deft.'s *malicious motive* to injure and oppress must be expressly stated; and it is not enough to say, that the deft. brought an action against the plt. *ex malitia* and *sine causa*, *per quod* he put the plt. to great charges, 2 Wils. 30-5, 1 *ib.* 233, but falsely, wrongfully, &c., have been holden to be sufficient allegations to support proof of a malicious intent in the deft.: 1 Saund. 242, *a. n. 2*. As to what constitutes malice and want of probable cause, and when it is a mixed question of fact and law, see *post*.

The court out of which the process was issued should be correctly described: see *Rex v. Leonard*, 1 Str. 302; 3 M. & S. 166; 3 Taunt. 271; *ante*, 188. In an action for a malicious arrest on a plaint out of the Sheriffs' Court in London, it is sufficient to say, "at the Sheriff's Court in London, before J. A., one of the sheriffs," &c. So, the Court of Assize may be stated to be held either before the judges of assize, or before the one who, in fact, sat at the time: 14 East, 216; *Rex v. Alford*, *cited, ib.*; 218, *n. a.* But, where it was alleged that the trial and acquittal took place "in the court of our lord the king, before the king himself," and the proof was of a trial at *nisi prius*, and acquittal in *banc*, the variance was held fatal; 11 East, 508; *Woodford v. Ashley*, 2 Camp. 193. In 2 Wils. 302, it was held necessary to aver in the declaration that the deft. knew of the want of jurisdiction, the court having no jurisdiction.

The issuing of the writ must be stated. The day laid to this fact should be either the day of the *teste* of the writ, or the day it was actually sued out. When the writ is stated to be sued out in vacation, it should be laid

under a *videlicet*, or it will be demurrable, 5 Burr. 2586, *Atkinson v. Anderson*, cited in note (b), 3 T. R. 184; but, if the day be laid under a *videlicet*, although it be a day in vacation, and it be alleged that the court was then held, it has been decided in C. P., on special demurrer, that the day may be rejected as surplusage, *Luckett v. Plummer*, 2 B. & B. 659, and, if it be not alleged that the court was then held, a writ may be stated in pleading to have issued in vacation: 15 East, 378; *Harrington, v. Taylor*, 1 Saund. 300, *d. n.* (1.) The writ itself should be correctly stated, or a variance would be fatal: 1 H. Bl. 49; 1 T. R. 238. It is usual to set out the writ fully, but it does not appear to be necessary: 1 T. R. 239. Where the introduction of a letter or word renders the meaning nonsensical, it may be rejected as surplusage, *ib.*, Camp. 229; and even the addition of a name, as, where the declaration stated a latitat against Donner and J. Doe; with an *ac-etiam*, and the writ produced was against Donner and two others, and not against Doe, it was held not to be a material variance, *Hendray v. Spencer*, cited in 1 T. R. 238, n. (a.); nor would the misdescription of a person be a fatal variance, no ambiguity being thereby created; and, where the record described a person as "Samuel Glover, the younger," but the declaration styled him "Samuel Glover," *Ld. Ellenb.* overruled the objection, and said, that had there been a wrong description, or two persons of the same name, "some ambiguity would have arisen from the omission, and the objection would have been fatal: 1 Camp. 15. But it has been held, that the misspelling a name was fatal, though of similar sound; and *Ld. Kenyon* observed, "In case of pleas of abatement, it is sufficient that the sound is the same; but here it is a matter of written evidence. A writ stated and set out, and not corresponding with that produced in evidence, I think, is bad:" *Brown v. Jacobs*, 2 Esp. Rep. 726; 2 Camp. 270. A writ, directed generally to the sheriff of Middlesex, may be described as directed to the individual by name who was, in fact, sheriff of the county at the time: 2 Camp. 525. See, further, as to what a variance in stating the writ, *ante*, 188.

\*The indorsement on the writ for bail is usually stated. This [\*653] should be according to the fact. Where the declaration, for a *false return* on a *fi. fa.*, in setting out the writ, stated the indorsement to levy the sum, together with the sheriffs' poundage, officers' fees, and other legal charges and incidental expenses attending the same, and the writ, when produced, is to levy the sum, together with the sheriffs' poundage, officers', *et cætera*, it was held fatal, 5 Esp. Rep. 139; but, where the indorsement was stated to be for £24, and the writ produced was £24 and upwards, it was held sufficient, see 2 Chit. Pl. 447, *b.* In *Gadd v. Bennett*, 5 Price, 540, 4, it was held, that stating the *ac-etiam* clause of the writ as issued out for £50, (instead of £30, according to the fact,) and an indorsement for £15, the warrant being for £30, is a material variance. The date of the indorsement should be stated on the day on which the writ is stated to have issued, adopting the same venue. See further, as to the mode of stating the indorsement, and what a variance, *ante*, 189.

The *arrest* must be stated, and that it was effected maliciously; or, if there was no actual arrest of plt.'s body, but plt. found bail, that fact should be stated accordingly. The time during which deft. remained in custody should be stated, but the precise time is immaterial: 1 Stark. 48.

The *determination of the former suit* must be alleged, and that it was *legally* determined in his favour; and the averment must be proved precisely as stated: Co. R. 193; 2 T. R. 225. It seems that a general allegation of discontinuance is sufficient, without stating in what manner: 5 Price, 545. In Morg. Prec. 404-5, the allegation of discontinuance is thus: "that the plaint was duly ended and determined;" and, in the precedent in 3 Ld. Raym. Rep. 300, "that the said suit of the said W. M. is now wholly ended and determined;" and see, *post*, Willes, 517; 1 Camp. 295; see, also, 1 Esp. Rep. 80. Where a rule to discontinue the action on payment of costs had been obtained by the plt., but the costs not paid till a subsequent period, the court held that the judgment of discontinuance, when entered, related back to the day when the rule to discontinue was taken out, and the action was to be considered discontinued from that time: 1 B. & C. 649; 2 D. & R. 363. It is usual to state that the deft., and his pledges to prosecute, were held in mercy, &c.; but, being useless, it is as well omitted, as it is of no consequence whether or not they were amerced, if they took nothing by their writ; and a variance in the statement is immaterial: 13 East, 547; 2 Archb. P. 248. It is usual to refer to the proceedings, as remaining of record; but this does not seem necessary, and had better be omitted: see 2 Chit. Pl. 605, *n. d.* Under such an averment the record must be produced: 5 Price, 540, *post*.

The special damages, if any, resulting from the arrest, &c., should be stated; otherwise the plt. will be precluded from going into evidence of them: Pea. Rep. 46, 62; see *ante*, 520, *n. (a.)* Under assault and battery, where the declaration stated that plt. was detained till he gave bail to the sheriff, and it appeared that he had only paid the debt, and £10 for costs, under the statute, *Ld. Ellenb.* said, "Certainly the plt. cannot recover any damages for being held to bail, or being compelled to pay the debt and costs, &c.; but he may, nevertheless, support the action *pro tanto*; and if the arrest was malicious, and without probable cause, I think he will be entitled to a verdict:" 4 Camp. 214. Plt. cannot recover damages for imprisonment after gaol delivery, as remaining was his own fault; Bro. *Damages*, pl. 115; Sayer, *Dam.* 87. See, *post*, "*Trespass*:" evidence under *alia enormia*. The plt. is entitled to recover the taxed costs only, and not extra costs: 4 Taunt. 7; 1 Camp. 151-2; 9 East, 361; R. & M. 419.

*In Action for a MALICIOUS PROSECUTION.*] The venue is transitory. The declaration usually commences, as in slander, with an inducement of the plt.'s general good character: but this is not material or traversable: Sty. 118. If the proceedings were not prejudicial to the plt.'s character, it had better be omitted: Gilb. Ca. L. & E. 185; 12 [\*654] Mod. 208.

In an action for maliciously issuing a commission of bankruptcy, it is not necessary to aver that the plt. had not committed an act of bankruptcy: 2 Wils. 145-7. The four circumstances necessary to support this action should be stated: viz. the falsehood in the original charge: the want of probable cause for instituting it; the malice of the deft., and the damage to plt. either by imprisonment, or expense to him, or to his reputation; Gilb. Ca. L. & E. 185, 202. As to the allegation of want of probable cause and malice, see *ante*, 652.

The *deft.'s proceedings* in the transactions should be stated. A variance would sometimes be fatal. Thus, in stating that *deft.* went before a magistrate, misnaming such magistrate would be fatal; and a variance in the description of the justice's deputy would be fatal: see 2 B. & A. 756; 3 D. & R. 234; 1 *ib.* 266. It has been said, that *plt.* should allege that the former proceeding was instituted against *plt.* before a justice, or a court of competent jurisdiction; but this seems now immaterial: 2 Wils. 303; Com. D. *Action on Case for Conspiracy*, 4 T. R. 247; 1 Salk. 15; 2 Chit. Pl. 608, *n. a.* An action may be supported for the malicious prosecution of a bad indictment: *ib.*, 6 M. & S. 29. The proceedings should be stated to correspond with the record of acquittal, a copy of which should be produced at the trial, if the prosecution were for a felony, but not where it was for a misdemeanor: 1 W. Bl. R. 365; 1 T. R. 518. In stating an indictment preferred against *plt.*, the statement should accord with the caption or style of the particular sessions, as appears on the record of acquittal. In 2 W. Bl. R. 1050, a declaration for maliciously indicting at the general quarter sessions, instead of the general sessions, was held sufficient, because the indictment was cognizable at both sessions: 3 D. & R. 226; 4 B. & A. 435. The justices' names need not be stated: as to how to describe the justices, see 1 D. & R. 166; and, as to what are variances, Cro. J., 92, Yelv. 46, 9 East, 157. An allegation that the justices were appointed such by letters patent is unnecessary, Willes, 689; 2 R. C. P. 158. It is not necessary to state the court or justices had jurisdiction, *ante*, 652; but it should appear that the court had authority to determine the charge: 2 Chit. Pl. 612, *b.* In an action for maliciously issuing a commission of bankruptcy, it must not be stated that the commission issued out of the Court of Chancery: 3 Camp. 58; 1 Taunt. 71. Where an indictment was preferred, and thrown out, it should be described as a "bill," and not as an indictment: 1 Salk. 376; Com. D. *tit. Indictment, B.*

The *charge* instituted against *plt.* should be stated according to the fact; where the charge was laid before a magistrate, the statement of it is to be taken from the magistrate's warrant, or from the examination of the *deft.* on oath, when a sight of them can be obtained. A count stating that the *deft.* had maliciously indicted the *plt.* for wilful and corrupt perjury, is good after verdict, although the count did not set forth any indictment: 5 B. & A. 634; 1 D. & R. 266, *s. c.* An averment generally, that *deft.* charged *plt.* with an offence punishable by law, has been held good: 2 B. & C. 283; 3 D. & R. 519; 6 M. & S. 29. If the facts be stated specially, they must be proved accordingly. Where the substance only of the charge contained in a judgment or information before a magistrate is alleged, it seems that a variance will not be material, unless the charge itself be different. Where the declaration professed to set out the substance of the indictment, and in specifying the goods and their value, used the words *valoris* for *valentie*, it was held, the variance was immaterial: 6 Mod. 216. Where the declaration alleged, that the *deft.* charged the *plt.* before a justice with assaulting and beating him, and the charge was in fact for assaulting and striking, it was held, that as the declaration [\*655] did not profess to describe the warrant, and had stated the *\*charge* correctly in substance, the variance was not material: *Byne v. Moore*, 1 Taunt. 589. So, where the declaration for a malicious arrest stated the warrant to be to arrest the *plt.* for an assault with intent to rob A.

(the informant,) and the words of the warrant were, with intent to rob, as he verily believes: 2 Stark. Ev. 909. And, where it was alleged in the declaration, that the deft. charged the plt. with felony before a magistrate, it was held that the averment was supported by proof of a charge made, stating the suspicion of the deft.: *Davis v. Noak*, 1 Stark. 377. Evidence that the deft., upon his application to a magistrate, stated facts which showed the plt. to have been guilty of nothing more than a tortious conversion of the deft.'s goods, upon which the magistrate issued a warrant to apprehend the plt. on suspicion of felony, will not support an averment that the deft. imposed the charge of felony upon him: *Leigh v. Webb*, 3 Esp. Rep. 166. An averment, setting out the indictment, as that plt. "then and there did make an assault," when the indictment really said, "did then and there make an assault," is supported in evidence by such indictment: 1 C. & P. 137. If the plt., in his declaration, set forth the indictment, which contains several charges, it is sufficient to prove that some of them were maliciously preferred, although there were good grounds for the rest; *Reed v. Taylor*, 4 Taunt. 616; 2 Stark. Ev. 910. A general count, stating the proceedings very generally, should be adopted: see 5 B. & A. 634; 1 D. & R. 97, 266.

It must be stated that the prosecution came to a legal end before action brought, but the omission will be cured by verdict: see *ante*, Str. 114; Com. D. *Action on Case for Conspiracy*, c. 5. It is not, however, necessary that the plt. should have been formerly acquitted of the charge: 3 Esp. Rep. 165; 2 Chit. Pl. 610, *n. a.* An averment that the plt. was "released and discharged from the said imprisonment," would not suffice; and, if there has been a regular acquittal, it may as well be stated: 2 T. R. 231. It suffices to state deft. was acquitted by a jury, Willes, 517, 11 East, 5, 1, 3, 4; or acquitted generally: Yelv. 161. In stating a trial and acquittal, the statement should correspond with the record of acquittal; a variance would be fatal: see 4 T. R. 560, 590; Willes, 517; 9 East, 157; *ante*, 653, *post*. If it be stated that the acquittal was "in the court of our lord the king, before the king himself," when it was at Nisi Prius, the variance would be fatal: 11 East, 508; 2 Camp. 193. The day stated of the acquittal is immaterial: see 9 East, 157. It does not seem necessary to aver, in an action for maliciously issuing a commission of bankruptcy, that the same was superseded: 2 Wils. 383, Eden, *sed vide* 1 Taunt. 390.

The damages sustained by plt. should agree with the fact: see *ante*, 653. All damages not necessarily incidental to the premises should be stated.

PLEA.] In both actions, the general issue not guilty will suffice; see a special plea, stating the bankruptcy, &c., in an action for maliciously issuing out a commission of bankruptcy: 2 B. & C. 908.

### Precedents.

DECLARATION FOR A MALICIOUS ARREST, WHERE THE PROCEEDINGS IN FORMER SUIT WERE DISCONTINUED.

For that whereas the said deft., heretofore, to wit, on, &c. (*teste of writ*.) at, &c. (*venue*.) not then having any reasonable or probable cause of action whatsoever against the said plt., to the amount of the sum of money for which the said deft., maliciously caused the said plt., to be arrested, as hereinafter mentioned, but wrongfully and unjustly continuing

and intending to imprison, vex, harass, oppress, and injure, the said plt., falsely and maliciously caused and procured to be sued and prosecuted, out of the court of our said lord the king, before the king himself (the said court then and still being holden at Westminster, in the county of Middlesex,) a certain writ of our said lord the king, [\*656] called a latitat (if a bill of Middlesex \*br a capias in C. P., or special capias by original, describe it, as ante,) at the suit of the said defendant, against the said plaintiff, directed to the sheriff of Middlesex, (*examine carefully throughout with the writ, as a variance would be fatal, ante.*) by which said writ, our said lord the king commanded the said sheriff that he should take the said plt., if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, at Westminster, on ———, to answer the said deft. of a plea of trespass, and also to a bill of the said deft. against the said plt. for £—, upon promises, according to the custom of the said court of our said lord the king, before the king himself, to be exhibited, and that the said sheriff should then have there that writ. And the said deft., contriving and intending, as aforesaid, afterwards, and before the arrest hereinafter mentioned, to wit, on the day and year first aforesaid, at, &c. (*venue*.) aforesaid, falsely and maliciously, and without having any reasonable or probable cause of action whatsoever against the said plt., to the amount of £20, or upwards, caused and procured the said writ to be, and the same then and there was, marked and indorsed for bail for £23; and the said writ, being so marked and indorsed for bail, as aforesaid, the said deft., afterwards and before the said return thereof, to wit, on, &c. (*day of arrest or about it*.) at, &c. (*venue*.) aforesaid, contriving and intending, as aforesaid, and without having any reasonable or probable cause of action whatsoever against the said plt. to the amount of £20, or upwards, falsely and maliciously caused the said plt. to be arrested by his body, under and by virtue of the said writ, and to be thereunto imprisoned, and kept, and detained in prison for a long space of time, to wit, for the space of ——— hours then next following (if no bail were found, omit the following averment as to it, and, at all events, let it agree with the facts,) and until he, the said plt., in order to procure his release and discharge from the said imprisonment, was forced and obliged to, and did then and there procure certain persons, to wit, E. F. and G. H., to become bail and pledge for the appearance of him, the said plt., in the said court of our said lord the king, before the king himself, at the return of the said writ, to answer the said deft., according to the exigency of the writ: and, upon that occasion, he, the said plt., and the said E. F. and G. H., were forced and obliged to, and did then and there, enter into a certain bond or obligation for the purpose aforesaid; whereas, in truth and fact, he, the said deft., at the time of suing forth the said writ, and of the said arrest and imprisonment, had not any reasonable or probable cause of action against the said plt., to the amount of the said sum of money for which he, the said deft., so maliciously caused the said plt. to be arrested and held to bail, as aforesaid, or whereby or for which he, the said plt., by the law of this realm, or by the practice of the said court of our said lord the king, before the king himself, could or ought to have been arrested or holden to bail, as aforesaid. And the said plt. further saith, that such proceedings were thereupon had on the said suit, that, afterwards, to wit, in ——— term then next following, the said deft. did not prosecute his said writ (or bill) with effect, but voluntarily permitted the said suit to be discontinued for want of prosecution thereof, and the said action was and is, by means of the premises, and according to the course and practice of the said court, wholly ended, determined, and discharged. By means of which said several premises, he, the said plt., whilst he was so imprisoned, as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful affairs and business, by him during that time to be performed and transacted, but was also forced and obliged to lay out and expend, and did necessarily lay out and expend, divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the obtaining of his release from the said arrest and imprisonment, and in and about other the premises, and hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c., aforesaid, to the damages of the said plt. of £—; and therefore he brings his suit, &c. Pledge, &c.

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\*THE LIKE WHERE PLT. IN A FORMER SUIT WAS NON-PROSSED.

(As in the first precedent, till the description of termination of suit; and then proceed as follows :) And the said A. B., in fact saith, that the said C. D. did not prosecute his suit against the said A. B., but therein wholly failed and made default. And, thereupon,

afterwards, to wit, in — Term, in the — year of the reign of our said lord the king, it was considered by the said court of our said lord the king, before the king himself, that the said C. D. should take nothing by his bill (or writ,) and that the said C. D. should go thereof without day, &c.; and the said action was and is thereby wholly ended and determined, to wit, at, &c., aforesaid. By means, &c. (*Conclude as ante*, 656.)

WHERE THERE WAS A VERDICT FOR THE DEFT. IN THE FORMER SUIT.

(*As in the first precedent till the description of termination of suit, and then proceed as follows:*) And the said plt. in fact saith, that such proceedings were had in the first suit; that, afterwards, to wit, in — Term, in the — year of the reign of our said lord the king, it was considered in and by the said court, that the said deft. should take nothing by his said bill (or writ;) whereupon and whereby the said suit became and was, and is, wholly ended and determined, to wit, at, &c., aforesaid. (*Conclude with an allegation of damage, &c., as ante*, 656.)

See form where first suit was ended by payment of money into court, 2 Chit. Pl. 600.

*Malicious Prosecution.*] See precedent for maliciously prosecuting a charge of felony before a magistrate, and notes, 2 Chit. Pl. 606; for a prosecution of an indictment for perjury, *ib.*, 612; and a good general count, *ib.*, 616, 5 B. & A. 684, 1 D. & R. 266, *s. c.*; for a prosecution for an assault, 2 Chit. Pl. 614; see form for maliciously issuing a commission of bankruptcy against plt., *ib.* 617.

### Evidence.

*In action for MALICIOUS ARREST.*] The plt. should be prepared to prove—1, the issuing of the writ, and proceedings previous to the arrest; 2, the arrest; 3, the termination, of the former suit; 4, the malice and want of probable cause in the arrest; and, 5, the plt.'s damages.

*Proof of the Issuing of Writ, and Proceedings previous to the Arrest.*] The observations already made, *ante*, 652, as to the form of the declaration requiring strict proof of the affidavit to hold to bail, &c. will here apply. It is unnecessary to prove the affidavit, if the declaration do not state the indorsement was made by virtue of an affidavit filed, &c., *ante*, 188, 652. It is, however, advisable and usual to prove the affidavit, to connect the deft. with the arrest, which is done by producing it, or an examined copy, and proving the handwriting of the deft. or his agent, subscribed to the original: B. N. P. 13; *Woulfe v. Sholls*, 1 H. B. 282; *Arundel v. White*, 14 East, 224; 1 Burr. 330.

The writ must be returned and proved, as *post*, "*Writ.*" If there be a variance, it will be fatal: *ante*, 188, 652.

*Proof of Arrest or finding Bail.*] The arrest, or that plt. was put to some expense in finding bail, &c., must be proved. To prove the actual arrest, call the officer, or other witness present. The officer should be served with a *subpoena duces tecum*, to produce the warrant directed to him, though this is not indispensably necessary, and it will be sufficient to prove the arrest: *Jones v. Wood*, 3 Camp. 228; *Fairlie v. Birch*, *ib.* 397. It would seem that the sheriff's return of *cepi corpus* would be sufficient for this purpose, as it is evidence of the facts therein stated: *Gyfford v. Woodgate*, 11 East 299; 2 Ph. Ev. 166. And it has been held, that the writ endorsed is sufficient evidence of the holding to bail: *Rogers v. Ilcombe*, 2 \*Esp. D. 38. The length of [\*658]

time, stated in declaration, during which plt. remained in custody, need not be proved to its full extent: *Bristow v. Heywood*, 1 Stark. 48.

The execution of the bail-bond should be proved, as stated, and the charge for the bond and execution thereof, &c., paid by the plt. for the same; for, unless the plt. give proof to that effect, he will not be entitled to recover such disbursement. The subscribing witness to the bond should be subpoenaed, and one of the bail or sheriff's officer called to prove the disbursements.

With respect to what constitutes an arrest, it is essential that some restraint has been imposed on plt. contrary to his will, and bare words used to the party at the time are insufficient, *Genner v. Sparkes*, 1 Salk. 79; but a touch, however slight, will constitute an arrest: 6 Mod. 173. It is sufficient, however, if plt. prove that the officer said to him, "I arrest you," or any words to that effect, and that the deft., in consequence thereof, acquiesced and went with the officer: *Homer v. Battyn*, B. N. P. 153; 1 C. & P. 153. And so, if a bailiff come into a room, and tell the deft. he arrests him, and lock the door, that is an arrest, for he is then in the custody of the officer: *Williams v. Jones*, Rep. T. Hardw. 301; 2 N. R. 211-2. But, where a constable, directed by the deft. to take the plt. on a charge of felony, told the latter, "you must go with me," upon which the plt., without further compulsion, attended the constable, it was held that this was a sufficient imprisonment: *Pocock v. Moore*, R. & M. 321. But, where a sheriff's officer, having a writ against A. B., tells him that he has a writ against him, upon which A. B. says very well, I will come to you immediately, and shortly after makes his escape, without having been touched by the officer, it is no arrest; R. & M. 26.

It should seem that, though there has been no arrest, yet, that proof of the plt. being compelled to procure bail would suffice to sustain the action. In a case, however, where A., by mistake, sues out a bailable writ against B., and gives it to C., an officer, to be executed, and C. says to B. he has a writ against him, but B. denying that he owed the money, C. did not take him into actual custody, and, on inquiry, the mistake was discovered, and B. was told he need give himself no further trouble in the matter, but, notwithstanding this, he afterwards put in bail above and incurred an expense of £14.; it was held, that he could not maintain an action against A. for a malicious arrest: *Bieten v. Burridge*, 3 Camp: 139.

*Proof of Termination of the former Suit.*] It is an essential requisite that the termination of the former suit be proved: 3 Price, 543. It must be determined by some legal means: 1 Esp. Rep. 80. Where it is determined by rule of court, it is generally proved by putting in the rule of court to stay proceedings; and the mere production of a rule of court is sufficient, if under the hand of the proper officer of any of the courts at Westminster; and there is no need to prove it to be a true copy, for it is an original: B. N. P. 229; 2 Ld. Raym. 745. Proof of a rule to stay proceedings and deliver up to the then deft. the bill of exchange upon which the action was brought has been held sufficient: *Brooke v. Carpenter*, 3 Bing. 297. Where the party discontinued by rule of court, on payment of costs, it was objected, that some record of discontinuance ought to be produced: but it was held, where there is a rule of court to discontinue, on which the party obtaining has acted by paying the costs,



that it was of itself sufficient, for, that where there is merely a writ, followed up with a discontinuance, no entry of judgment is ever made: *Bristow v. Haywood*, 4 Camp. 214; 1 Stark. 48, *s. c.*; 3 Price, 546; *Brooke v. Carpenter*, 11 Moo. 59. The plt. should, in that case, prove that the costs have been taxed and paid. A Judge's order to stay proceedings has been held insufficient: *Kirk v. French*, 1 Esp. Rep. 80; *sed vide* 3 B. & C. 140; 4 D. & R. 653. In an action for a false arrest upon a plaint in the sheriff's court of London, evidence was "given [\*659] that the usual course of that court, upon the abandonment of a suit by the plt., was to make an entry in the minute-book of "withdrawn," and it was held, that proof of such entry in the minute-book was sufficient evidence of the determination of the suit: *Arundell v. White*, 14 East, 216.

*Proof of Malice and Want of probable Cause.*] This is a most essential proof, and a failure in it would entitle the deft. to a verdict: see Co. Lit. 161, *n.* 4; 3 Lev. 210; 2 Wils. 305; 1 Lev. 275. Though the plt. should prove malice, yet, if he failed to prove the want of probable cause for the proceeding, he would not succeed: see *Purton v. Honnor*, 1 B. & P. 205; *Austin v. Debenham*, 3 B. & C. 139; 4 D. & R. 653.

Malice and the want of probable cause is a compound proposition, and may be a mixed question of fact and law for the jury to ascertain the facts, under the Judge's direction: thus, where A. arrested B. on professional advice, and it was a question whether he acted *bona fide* upon such advice, the jury are to draw the conclusion as to his sincerity from the facts before them; and it was in this case observed by Abbott, C. J. that, under the circumstances of the case, the question of "probable cause was matter of fact for the jury, and, not of law, for the Judge to decide, and that he had, in consequence, directed the attention of the jury to the deft.'s conduct;" but, on the contrary, if the fact had appeared that the deft. acted *bona fide* on the advice given, the inference of want of malice and probable cause would then have been a matter of law for the Judge to determine, who, thereupon, must have nonsuited the plt.: *Ravenga v. Mackintosh*, 4 D. & R. 193; 2 B. & C. 693, *s. c.*; *Snow v. Allen*, 1 Stark. 503; see, also *Johnstone v. Sutton*, 1 T. R. 545; 1 Wils. 232; B. N. P. 14; 1 Gow. 20; 2 Moo. 82; *Freeman v. Arkell*, 1 C. & P. 138. [In an action for maliciously arresting the plaintiff in execution at the defendant's suit, it seems that the latter is liable although the plt. was taken in execution at the instance of deft.'s attorney, without the knowledge of the defendant or his previous assent; *Jones v. Nicholls*, 3 M. & P. 12.] In these actions, proof of express malice will be required, but defts. are less favoured than in those arising from malicious prosecution; as a civil suit is prosecuted merely for the private benefit of the individual, whereas a prosecution of an offence affects the public interest: 2 Wils. 307.

There are two descriptions of malice: malice in fact; and in law. The former, in common acceptation, means ill-will against a person; the latter means a wrongful act, done intentionally. And the question of malice, as a question of fact, which may be very comprehensive, including the truth of the whole series of facts forming the deft.'s justification, from the manner, the occasion, &c., is for the jury; "but, where the law implies such malice as is necessary to maintain the action, it is the duty of the Judge to withdraw the question of malice from the consideration of the jury:"

4 B. & C. 247; 6 D. & R. 269. [See *Mitchell v. Jenkins*, 2 Nev. & M. 301.] And one of these two descriptions of malice must be proved. It is not sufficient to show that a writ was sued out, or the arrest made, after the payment of the debt, but a malicious intent must, in such case, be made out in evidence, *Scheibal v. Fairbairn*, 1 B. & P. 388, *Gibson v. Chaters*, 2 B. & P. 129, *Page v. Wiple*, 3 East, 314; and, in a late case, where a writ was issued, by mistake, against the son instead of the father, and he was imprisoned four days, Abbott, C. J., held, that, as there was no evidence of malice, the action was not sustainable: *Guildhall, October, 1825, MS.*, cited 3 Chit. Black. Com. 126. It is not of itself evidence of malice that the deft. suffered himself to be nonprossed in the former suit, *Sinclair v. Eldrid*, 4 Taunt. 7; as to taking money out of court, *post*. But it has been held *prima facie* evidence of malice, that the deft. discontinued the former suit immediately after being ruled to declare, on the ground, "that the very short interval that elapsed between the arrest and abandonment of the action precluded the supposition of any change taking place in his means of proof," *Nicholson v. Coghill*, 4 B. & C. 22; and, where a deft. is in custody under a *ca. sa.*, and tenders the debt and costs, the plt. is bound to accept them, and to sign an authority to the sheriff to discharge him, and the refusal is *prima facie* evidence of malice: 4 B. & C. 26; 6 D. & R. 129.

\*The want of *probable cause* must be established, *ante*, 569; [\*660] it is not enough to show that the action was unfounded; for, if there was reasonable ground to apprehend that the sum for which the party was arrested was due, no action would lie: 3 Esp. Rep. 34. And a party is not liable if he acts under what he conceives the sound advice of a pleader: 1 Stark. 502; *Ravenga v. Mackintosh*, 2 B. & C. 693; 4 D. & R. 107; 1 C. & P. 264, *s. c.* And, where there were mutual dealings, if it be proved, and the plt. in the former suit, who arrested for the whole amount, knew there was a set-off, greatly diminishing his debt, it will be evidence of want of probable cause and malice: *Austin v. Debenham*, 3 B. & C. 139; 4 D. & R. 653. The case of *Brown v. Pigeon*, 2 Camp. 594, was overruled. In such case, the deft.'s knowledge of the set-off may be proved by his admission or settlement of accounts, or by evidence of the set-off, as in other cases, *post*, *Set-off*. Taking a less sum out of court, and not proceeding in the suit, is not sufficient evidence of malice and want of probable cause, it appearing that deft. had claimed a larger sum: *Jackson v. Burleigh*, 3 Esp. 34. But *circumstances* will often exclude the presumption of malice and want of probable cause: thus, where plt. in a former action arrested deft. for £25, and deft. paid £9. 6s. into court, which plt. took out, it was held not to be evidence of malice; though, on a previous settlement of accounts between plt. and deft., deft. made himself debtor merely in a balance of £9. 6s., it appearing that the plt. had then claimed a balance of £25 as due to him; and *Lord Kenyon*, observed, "that as deft. acted under the impression of a mistake, in believing more than £10 to be due, and under that belief held him to bail, he had a probable cause, and was warranted in that proceeding;" that plt. (deft. in former suit) must prove that the arrest was made with full knowledge that the debt was under £10, *Jackson v. Burleigh*, 3 Esp. Rep. 34; and, where the party was arrested after the payment of the debt to deft.'s agent, but upon an affidavit made before, it was held not to be malicious: 2 B. & P. 129. Also, where plt.

discontinued a former action, on a note against the deft., where he would have been acquitted from the laches of the former plt. in not giving due notice of dishonour, it was held that there was no evidence of malice, 1 Stark. 48, s. c., 4 Camp. 213; and when, after suing a bailable writ, plt. was told not to trouble himself, but went to the expense of putting in special bail, it was held he could not maintain an action for a malicious arrest: 3 Camp. 139; but it was held to be malice to have sued out a writ after the release of the debt: Hob. 267.

*Proof of Damages.*] The special damage must be proved as laid in the declaration, and the plt. will not be allowed to give evidence of any injury not stated therein: see *ante*, 653. It is necessary the arrest should actually have been made, and the merely suing out a bailable writ, to which plt. voluntarily put in bail above, will not entitle the deft. to recover his costs, *Bicten v. Burridge*, 3 Camp. 139; 2 N. R. 211; and he must, therefore, prove the expenses he was put to in consequence of the arrest, and the especial damage or injury above stated: 4 Taunt. 7; 2 Esp. D. 35; *ante*, 653. Costs, as between client and attorney, will not be allowed: see 4 Taunt. 7; *Webber v. Nicholas*, R. & M. 419, *sed vide* 1 Stark. 306.

*Competency of Witnesses.*] An arbitrator cannot be called as a witness to prove facts which transpired, by examining the parties themselves, and on examining the plt.'s books on a reference of the former action: *Habershon v. Trosby*, 3 Esp. Rep. 38; *sed vide Gregory v. Howard*, 3 ib. 113.

#### ACTIONS FOR MALICIOUS PROSECUTION.

*Evidence.*] In these actions, plt. must prove—1, the inducement, if it be material to support the action; 2, the prosecution against plt.; 3, the termination\* thereof in plt.'s favour; 4, the deft.'s being [\*661] the prosecutor; 5, the deft.'s malice, and want of probable cause for the prosecution; and, 6, the damages.

*Proof of Inducement.*] The general inducement of good character, usually inserted in declarations for malicious prosecutions, is not traversable, and no evidence of such good character is admissible: Styles, 118; *ante*, 653; *post*, "*Slander*." But special inducements, in a case where plt. has been peculiarly injured in his trade, or otherwise, should be proved: see *post*, "*Slander*." In an action for maliciously issuing a commission of bankruptcy, the inducement should be proved, but in such action it is not necessary to prove that the plt. did not commit an act of bankruptcy: 2 Wils. 145–7. But it may be advisable to be prepared to do so, or else to prove plt. was not a trader, or otherwise subject to the bankrupt laws.

*Proof of the Prosecution.*] The proceedings themselves, which the deft. issued, or procured to be issued against him, should be proved; as where deft. has been taken into custody under a warrant granted by a justice of the peace, the information must be produced, which is done by subpoenaing the justice of the peace, or his clerk, with a *duces tecum* to produce the original information, and proof by them that it was made and sworn by the deft., and then the warrant granted on it, which must be

produced, either from the constable or the justice. But, where evidence was given of the loss of the warrant, parol evidence of its contents has been received, without proof of the information: *Newsam v. Carr*, 2 Stark. 70. In a case for maliciously charging the plt. with an assault before a magistrate, and where the depositions were returned by him to the sessions, and a bill for indictment preferred by the deft., which was ignored, the clerk of the peace having proved, that when a bill of indictment was thrown out by a jury, he usually destroyed or threw away the depositions, and those in the present case having been searched for and not found, it was held to be sufficient evidence of their destruction, and parol evidence of their contents was admitted: *Freeman v. Arkell*, 2 B. & C. 494.\* In the same manner, whether the prosecution were by indictment in the K. B., at the assizes, or quarter sessions, the prosecution and acquittal must be proved in the usual way, by the production of the record, or proof of an examined copy: B. N. P. 13; *Kirk v. French*, 1 Esp. Rep. 81; 1 W. Bl. R. 385: *post*, "Record." And in an action for a malicious prosecution, by indicting the plt. at the quarter sessions, it was held insufficient to produce the original indictment, as it was no evidence of the caption, which was a material averment in the declaration, viz. that the quarter sessions was held at such a time, such a place, and before such parties; as *Wilmot, J.*, was of opinion, that this could not be supported by parol evidence of the minutes of the sessions, but that a record should have been made for the purpose, and an original or an examined copy, thereof produced: *Edwards v. Williams*, 2 Esp. Rep. 37. The record, or copy, is admissible, without proof of an order of the court, of a *fiat* of the attorney-general: *Legatt v. Tollervey*, 14 East, 342. If the court will not grant a copy of the record, or plt. cannot otherwise obtain it, no action can be supported: 1 Chit. Com. L. 835. But, if it be obtained, it is immaterial how: 1 Man. & R. 275. We have already seen, that the action may be supported, although the original prosecution was on a bad indictment, or though no further act was done than obtaining a warrant against plt.: *ante*, 654. Proof must be given to identify the plt. with the person prosecuted.

We have already seen what will constitute a variance between the statement, and proof as to the prosecution against plt.; if the mode of prosecution and charge against plt. be substantially proved, it will, in general, suffice.

[\*662] \* *Proof of Determination of Prosecution in Plaintiff's Favour.*] It must be proved that the prosecution was determined in plt.'s favour. B. N. P. 13; *Hunter v. French*, Willes, 517. It is not sufficient to show that the proceedings were stayed by the *nolle prosequi* of the attorney-general, *Goddard v. Smith*, 6 Mod. 262; as, notwithstanding the *nolle prosequi*, fresh proceedings may be sued out upon the indictment: *ib.* But it is otherwise if he had pleaded not guilty, and the attorney-general had confessed it: *ib.* It is, however, sufficient, if the party were acquitted upon a defect in the indictment: *Wicks v. Fentham*, 4 T. R. 247; 2 Stark. Ev. 907. The return of "not a true bill" by the

\* In an action for a malicious arrest on a charge of felony, it is not necessary for plaintiff to give in evidence the whole of the proceedings before the magistrates: *Biggs v. Clay*, 3 Nev. & M. 464.

grand jury, or the verdict of acquittal, will be evidence of the termination of the prosecution in plt.'s favour: *Hunter v. French*, Willes, 571. An action for maliciously suing out a commission of bankrupt against plt., under which his goods, &c., were sold, is sustainable, whether the commission has been superseded or not, if the party be not liable to the bankrupt laws: see, however, 7 Taunt. 399. But the *supersedeas* must, at all events, be proved, if stated; and it is not enough to prove an order by the Lord Chancellor, directing it to be superseded; but a writ of *supersedeas*, under the great seal, should be proved: *Poynton v. Forster*, 3 Camp. 58; see, generally, 1 Salk. 14; 1 B. & P. 205; 1 Saund. 238, 9.

*Proof that Defendant was Prosecutor.*] Where the prosecution is by indictment, the plt. must prove the deft. to have been the prosecutor. For this purpose, it may be shown that deft. employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it, paid the expenses, &c., or was otherwise instrumental in forwarding the prosecution; 2 Stark. Ev. 908. The indorsement of the deft.'s name on the back of the bill will only be sufficient to prove him to be a witness, but not the prosecutor, B. N. P. 14. He may, therefore, establish that fact, by calling one of the grand-jury who found the bill, *Sykes v. Dunbar*, Selw. N. P. 1035, or the original information taken before the justice, or giving in evidence a copy of the indictment and acquittal, examined with the original, either in the King's Bench or quarter sessions; or the original proceedings may be produced by the officer of the court where the indictment was preferred. But, if the indictment was for felony, as no action will lie in that case, where the deft. had been acquitted, unless the court grant a copy of the record and acquittal, evidence must be given to that effect, and the leave be proved, *id.*; in which case there should be an order from the attorney-general to the officer of the court, to produce the record of acquittal, and the order of the court. The copy of the indictment, if produced, must be proved by a witness who examined it with the original, and then evidence be given of the trial and acquittal, of the deft.; for which purpose the record, or an examined copy, is sufficient, and should be given in evidence: Esp. Ev. 411.

*Proof of Malice.*] The plt. should give evidence from which malice may be inferred; but he is not called on to give direct evidence of it, for, if he proves absence of probable cause, it will be sufficient: *Burley v. Bethune*, 5 Taunt. 583. [See *George v. Radford*, 3 C. & P. 467.] Proof that the deft. published an advertisement of the finding of the indictment, with other scandalous matter, is evidence of malice: *Chambers v. Robinson*, 1 Str. 691. Proof of an acquittal, for want of prosecution, is not even *prima facie* evidence of malice to support plt.'s action: *Purcell v. McNamara*, 9 East, 361. In an action by A., for the malicious prosecution by C. of an indictment against A. & B., evidence of the misconduct of C. towards B., after his apprehension, tending to show the bad motives of C., is admissible: *Caddy v. Barlow*, 1 Man. & R. 275. In an action for maliciously issuing a commission of bankruptcy, it seems that proof of the chancellor's having assigned the bond to plt. is conclusive evidence of malice: see 1 Swanst. 23.

*\*Proof of Want of probable Cause.*] Plt. must prove that [\*663] there was no colour for making the charge, or taking him up on

the warrant, by proving that he was at another place, or was confined with illness at the time the imputed offence was committed. This can be proved by witnesses who were with him at that time, but it requires very clear evidence, as, if there be a doubt, or he could by possibility be guilty, from the existence of suspicious circumstances, which might deceive the deft., plt. will be nonsuited, *Incedon v. Berry*, 1 Camp. 203, n.; and even proof of express malice will not be proof of it: *Johnson v. Sutton*, 1 T. R. 545. In an action for maliciously indicting plt. for an assault, it is not sufficient evidence of the want of probable cause, to prove that deft. was guilty of the first assault: Pea. Rep. 135. It has been held, that evidence of the bill having been thrown out by the grand-jury is sufficient to warrant an inference of the absence of probable cause; *per Holroyd, J., Nicholson v. Coghill*, 4 B. & C. 24. In B. N. P. 14, it is said, with reference to actions for a malicious prosecution, that "where the facts be in the knowledge of the deft. himself, he must show a probable cause, though the indictment be found by the grand jury, or the plt. shall recover without proving express malice;" *per Bayley, J., ib.*; see further *ante*, 662, 659. The remarks of the Judge on the trial of the indictment, tending to cast censure on the mode in which the prosecution had been conducted, are admissible for the plt.: *Warne v. Terry, coram Littledale, J.*, *Winton Sum. Ass.* 1826, *MS.*; *Roscoe, Ev.* 241.

*Proof of Damage.*] In order to support this action, it is essential to prove that some legal damage has been sustained, either to the person by imprisonment, to the reputation by scandal, or to the property by expense. Damage by imprisonment will be sufficiently proved, though the detention might have been momentary; but the length of the imprisonment, and other circumstances of aggravation, should be given in evidence, to increase the damages awarded by the jury. Plt. cannot recover damages for imprisonment after gaol delivery, as it was his own fault to continue in prison: *Sayer, Dam.* 87. As to what constitutes an imprisonment, see *ante*, 658.

As to proof of damage to the reputation by scandal, the prejudice to the party's fame and reputation constitute a sufficient ground of action, *Savil v. Roberts*, B. N. P. 13; and any charge which would be a libel, if not preferred in the course of legal proceedings, may be considered sufficiently defamatory to enable the party to support an action for a malicious prosecution. But an indictment for a mere trespass, as an assault, does not sufficiently scandalize the party accused to enable him on the ground of injury to his reputation, to support an action: 12 Mod. 210; 2 B. & C. 494; 3 D. & R. 669. Where a man is maliciously indicted for a crime which is a scandal to him and hurts his fame, an action lies, although the indictment be insufficient, or an *ignoramus* found, B. N. P. 13, *Chambers v. Robinson*, Str. 691; for, although no expense may have been incurred, the mischief of the slander has been effected: *ib.*

As to proof of damage to the property by expense, plt. may prove that he has been put to needless expense to defend himself: B. N. P. 14. As prosecutions must be carried on for the benefit of the public, the courts, from a wish to discourage prosecutions in the case of indictment for felonies, will not afford the deft. a copy of the indictment, without which a civil action cannot be supported, unless in the opinion of the court the prosecution appear to be malicious: 1 T. R. 518; *Carth.* 421: 1 Ld.

Raym. 352. As to when plt. voluntarily puts himself to expense, see *ante*, 659.

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\*MARRIAGE.—PROOF OF, *ante*, 396.

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MARRIAGE.—BREACH OF PROMISE OF.

FORM OF REMEDY, AND PLEADINGS.] Assumpsit is the proper remedy for a breach of a promise to marry. With respect to the pleadings, it is not necessary that plt. should specify a particular time for the marriage, Carth. 467; nor is it necessary to allege it in the declaration. If the promise were to marry on a particular day, it should be so described in one count: 2 Chit. Pl. 321. As to what request is sufficient, see Ld Raym. 387. As to the count to marry in a reasonable time, it is advisable to state a count of this nature, omitting the averment of the deft.'s having notice of plt.'s readiness to marry, and inserting an averment of a request to marry, or a positive refusal to marry: 2 D. & R. 55.

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*Precedents.*

FOR NOT MARRYING UPON REQUEST.

For that whereas, heretofore, to wit, on, &c. (*any day about time of promises*.) at, &c. (*venue*.) in consideration that the said plt., being then and there sole and unmarried, at the special, &c., of the said deft., had then and there undertaken and faithfully promised the said deft. to marry him, the said deft., when she, the said plt., should be thereunto afterwards requested, he, the said deft. undertook, and then and there faithfully promised the said plt., to marry her, the said plt., when he, the said deft., should be thereunto afterwards requested. And the said plt. avers, that she, confiding in the same promise and undertaking of the said deft., hath always from thence hitherto remained and continued, and still is, sole and unmarried, and hath been for and during all the time aforesaid, and still is, ready and willing to marry him, the said deft., to wit, at, &c. aforesaid. (*If the deft. have married another woman, no request need be averred, but the following allegation should be inserted:*) "Yet the said deft., not regarding, &c., but contriving, &c., after the making of his said promise and undertaking, to wit, on, &c., at, &c., aforesaid, wrongfully and injuriously married a certain other person, to wit, one ———, contrary to his said promise and undertaking, to wit, at, &c., aforesaid." (*The other counts will vary accordingly.*) And, although the said plt., after the making of the said promise and undertaking of the said deft., to wit, on, &c., at, &c., aforesaid, requested the said deft. to marry her, the said plt., yet the said deft., not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and injure the said plt. in this respect did not nor would, at the said time when he was so requested, as aforesaid, or at any time before or afterwards, marry her, the said plt., but hath hitherto wholly neglected and refused, and still doth neglect and refuse, so to do.

SECOND COUNT, FOR NOT MARRYING IN A REASONABLE TIME.

And whereas, also, heretofore, to wit, on the day and year aforesaid, at, &c., aforesaid, in consideration that the said plt., being then and there unmarried, at the like special instance and request of the said deft., had then and there undertaken, and faithfully promised the said deft., to marry him, the said deft., he, the said deft., undertook, and then and there faithfully promised the said plt., to marry her, the said plt., in a reasonable time then next following. And the said plt. avers, that she, confiding in the said last-mentioned promise and undertaking of the said deft., hath always hitherto remained and con-

[\*665] tinued, and still is, sole and unmarried, and hath been for and during all the time last aforesaid, and still is ready \*and willing to marry the said deft., to wit, at, &c., aforesaid, whereof the said deft. hath always had notice; and, although a reasonable time for the said deft. to marry her, the said plt. hath elapsed, since the making of the said last-mentioned promise and undertaking of the said deft., yet the said deft., not regarding his said last-mentioned promise and undertaking, but contriving, &c. (as in the first count,) did not nor would, within such reasonable time, as aforesaid, or at any time afterwards, marry her, the said plt., but hath hitherto wholly neglected and refused so to do.

#### THIRD COUNT FOR NOT MARRYING GENERALLY.

And whereas, also, heretofore, to wit, on, &c., and &c., aforesaid, in consideration that the said plt., being then and there sole and unmarried, at the like special instance, &c., had then and there undertaken, and faithfully promised the said deft., to marry him, the said deft., he, the said deft., undertook, and then and there faithfully promised the said plt., to marry her, the said plt. And the said plt. avers, that she, confiding in the said last-mentioned promise and undertaking of the said deft. hath always from thence hitherto remained and continued, and still is, sole and unmarried, and hath been for and during all the time last aforesaid, and still is, ready and willing to marry him, the said deft., to wit, at, &c., aforesaid; and, although a reasonable time for the said deft. to marry the said plt. hath elapsed, since the making of the said last-mentioned promise and undertaking, and although the said plt., after the making of the said last-mentioned promise and undertaking of the said deft., to wit, on, &c., at, &c., aforesaid, requested the said deft. to marry her, the said plt., yet the said deft., not regarding his said last-mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plt. in this respect, did not nor would, at the said time when he was so requested, as last aforesaid, or at any time before or afterwards, marry the said plt., but, on the contrary thereof, he, the said deft., at the said time when he was so requested, as last aforesaid, wholly refused then or ever to marry her, the said plt., to wit, at, &c., aforesaid, to the damage, &c.

#### *Evidence for Plaintiff.*

The action is sustainable only where the promise to marry is *mutual*, and evidence must be adduced accordingly: 1 Rol. Ab. 1, 5, 22. It has been, however, held, that a promise by a person of full age to marry an infant, was binding on the person of full age: *Holt v. Ward*, 2 Str. 937. A promise to marry is not within the Statute of Frauds, *Corn v. Baker*, 1 Str. 34; but an executor or administrator cannot sue upon such a promise made to his testator or intestate: *Chamberlain v. Williamson*, 2 M. & S. 408. A bill in equity lies to compel the deft. to disclose whether he promised to marry: *Vaugh v. Aldridge*, Forrest, R. 42.

In support of this action, the plt. must prove the mutual promises to marry, either express or presumptive. In an action by a lady for a breach of promise of marriage, it is not necessary, for the purpose of making out the mutual promises which are necessary to support the action, that the plt. by words consented to accept the deft.; but the jury may infer such consent from the circumstances of her making no objection at the time of the offer, and her afterwards receiving visits from the deft. in capacity of a suitor: *Daniels v. Bowles*, 2 C. & P. 553. And in an action by a woman against a man, it was held, that her carrying herself as one consenting and approving, was sufficient evidence of her having mutually promised, and no other evidence is usually given: *Sutton v. Mansell*, 3 Salk. 10. A promise to marry generally is, in point of law, a promise to marry within a reasonable time: *Potter v. Deboos*, 1 Stark. 82. Thus it has been held, that where A. stated to the father of the plt. that he had pledged himself



to marry his daughter in six months, or in a month after Christmas, that, although it varied from the promise laid in the \*special [\*666] counts, which alleged a promise to marry within a specified time, it was evidence from which the jury may infer a promise to marry generally: *ib.* In an action for a breach of promise of marriage, the promises declared on were, first, to marry on request: secondly, the like, assigning for breach that the deft. had married another: thirdly, to marry within a reasonable time: and, lastly, to marry generally. The proof was, that the deft. had said that he would marry the plt. in July: held that, notwithstanding the variance, the jury were warranted by the evidence in inferring a promise to marry generally, and that the plt. was entitled to recover on the last count of the declaration: *Phillips v. Crutchly*, 1 M. & P. 239.

To support this action for a breach of promise of marriage, if the deft. has not married another, there must be evidence of an offer to marry on the part of the plt., and a refusal by the deft.; but, if the plt.'s father go to the deft., and ask him if he means to fulfil his engagements to his daughter, and he reply "Certainly not," this will be sufficient: *Gough v. Farr*, 2 C. & P. 634. And conduct and declarations which are equivalent to a refusal are sufficient evidence. Where it is alleged that plt. has married another woman, the fact must be proved.

A promise to marry need not be stamped: *Oxford v. Cole*, 2 Stark. 351.

#### *Evidence for Defendant.*

In general, where one party has improvidently made a promise to marry, the immoral conduct and general bad character of the other party will constitute a sufficient defence. In an action for a breach of promise of marriage, if on the part of the deft., it is proved that the plt. is a loose and immodest woman, and that he broke his promise on that account, it goes in bar of the action; but, if it also appear that, when he made the promise, he was aware of these circumstances, it is no defence. In such an action, the deft. may, in mitigation of damages, go into evidence that his relations disapproved of the match; and, if his father is an incompetent witness, on account of his having employed the attorney to conduct the defence, a witness will be allowed to prove that he has heard the father express to the deft. his dislike to the marriage: *Irving v. Greenwood*, 1 C. & P. 350. Thus, if a man who has made a promise of marriage, discovers that the person he has promised to marry is with child by another man, he is justified in breaking such promise, and, if any man has been paying his addresses to one that he supposes to be loose and immodest, he is justified in breaking any promise of marriage that he may have made to her; but the jury must be satisfied that the plt. was a loose and immodest woman, and that deft. broke his promise on that account, and they must also be satisfied that the deft. did not know her character at the time of the making of the promise; for, if a man knowingly promise to marry such a person, he is bound to do so: *per Abbot, Irving v. Greenwood*, 1 C. & P. 350. General charges and imputations of this kind would, however, go to the damages: *Baddley v. Mortlock*, Holt, C. 151. And, though a promise to marry be proved, yet, if it appear that the plt. was a man who had conducted himself in a brutal and violent manner, and had threatened to use her ill, she had a right to say that she would not commit her happiness to such keeping, and she might set it up as a

good legal defence; but his Lordship considered that the gross manners of the plt. only went to the damages, and not to the verdict: *per Ld. Ellenb., C. J., Leeds v. Cork*, 4 Esp. Rep. 256. And, where the defence was, that, previous to the breach of the promise, dishonesty and perjury had been imputed to the plt., and that, the deft.'s wife calling upon him to vindicate his character, he said he could do so, but in fact did not, and therefore she broke her promise, *Gibbs, C. J.*, ruled, that, for her [\*667] to be absolved from her promise, she "must show that the plt. was, in fact, a man of bad character; for, without proof that the charges were well founded, such charges would only go to the damages: *Baddeley v. Mortlock*, Holt, C. 151. Where, in an action for breach of promise of marriage, the deft. relies on the general bad character of the plt., a witness may be examined as to representations made to him by third persons, *Foulkes v. Selway*, 3 Esp. Rep. 236; and, in this case, *Kenyon, C. J.*, observed, "Character was the only point in issue; and that was public opinion, founded on the conduct of the party: he therefore thought that what the public thought was evidence:" see *Pothier, Traite du Contrat de Marriage*, p. 2, c. 1, art. 7.

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MASTER AND SERVANT.—See AGENT;—PRINCIPAL AND AGENT.

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MENACES.—See DURESS.

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### MESNE PROFITS.

**FORM OF REMEDY.]** As, in most actions of ejectment, mere nominal damages and costs are recoverable therein (when otherwise, see *ante*, 456-7,) in order to complete the remedy for damages, when the possession has been long detained, an action of trespass for the mesne profits must be brought, after the recovery, in ejectment. A lessor in ejectment may waive the trespass, and recover the mesne profits, in an action for use and occupation; but this election must be limited to the profits accruing antecedently to the time of the demise in the ejectment: *Adams*, 328; *Birch v. Wright*, 1 T. R. 378; *Goodtitle v. North*, Doug. 584; Cowp. 243. When a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action of mesne profits, and maintain debt, on the 4 G. 2, c. 28, against the tenant, for double the yearly value of the premises, during the time the tenant so holds over; for the double value is given by way of penalty, and not as rent: *Trimings v. Rowlinson*, Burr. 1603. *Quare*, as to debt for double rent, see *Adams*, 138.

Trespass lies, though the profits were taken anterior to the time of the demise in the declaration in ejectment, 2 Burr. 667; unless where a fine has been levied, in which case trespass cannot be supported for an injury committed anterior to the entry to avoid the fine: 7 T. R. 732; 3 Bl. Co. 210. A copyholder may maintain an action of trespass for mesne profits from the time of surrender, after admittance and subsequent

recovery in ejectment, 16 East, 210: but trespass will not lie for mesne profits which accrued before an actual entry, made to avoid a fine, 1 Saund. 319. b.; 7 T. R. 727.

This action may be brought in the name of the lessor of the plt., or of the nominal plt. in ejectment: 2 M. & S. 473. If there were several demises, and the party interested had no right of possession anterior to the day of the demise laid in the declaration in ejectment, or if there be any expectation of the death of lessor of the plt., or of the bankruptcy of deft., it is most advisable to proceed in the name of the nominal plt., but, otherwise, in the name of the lessor. If the action is brought by the lessor, the \*court will compel the real plt. to give security [\*668] for costs: Sayer on Costs, 126. A tenant in common may sue separately in trespass for the mesne profits: 5 T. R. 248; 2 W. Bl. R. 1077. A tenant in common, who has recovered in ejectment, may maintain this action against his companion: 3 Wils. 118. A joint action for mesne profits may be supported by several lessors of the plt. in ejectment, after recovery therein, although there were only separate demises by each: 5 M. & S. 84; 2 Chit. Rep. 410.

The action should be against the deft., against whom the judgment in ejectment was recovered, or, at all events, against the party in actual possession and trespassing: *Burne v. Richardson*, 4 Taunt. 720; *post*, 669.

Any person found in possession after the recovery in ejectment, is liable for the mesne profits, during the time he was in possession: Woodfall, L. & T. 511. The action does not lie against executors or administrators for the profits accruing during the lifetime of the testator. See 6 Ves. 73, as to relief against them in equity.

FORM OF PLEADINGS.] There is nothing peculiar relating to the form of the pleadings, distinguishing them from other actions of trespass: *post*, "Trespass." It is usual to state the day of deft.'s entry to be the same as the day of the ouster laid in the declaration in ejectment, but this is immaterial; and, where the deft.'s right of possession and the deft.'s unlawful entry were anterior to that day, the time had better be stated according to the fact. The declaration should expressly state the different parcels of the land, &c., from which the profits arose, or the deft. may plead the common bar. It should also state the time when the deft. broke and entered the premises, and ejected the plt., the length of time during which he so ejected him, and the value of the mesne profits of which he deprived him. The omission of these statements would be objectionable on demurrer, but will be aided after a judgment by default, or on general demurrer: 13 East, 407: Adams, 332. If any particular damage, waste, or injury, were done by deft. to the premises, the same should be stated fully. The costs should, at all events, be stated, in an action where the judgment was against the casual ejector.

The plea is usually the general issue. As to what defences should be pleaded specially see *post*, "Trespass." Deft. cannot, under the general issue, give in evidence that the plt. accepted the rent of the premises for the time in dispute, and agreed to waive the costs in ejectment: *Doe v. Lee*, 4 Taunt. 459. He may plead the Statute of Limitations, B. N. P. 88; and, in that case, plt. cannot recover beyond six years' profits. The insolvency of the deft. is not a good plea, 3 B. & A. 407, nor is bankruptcy, Deng. 584. The deft. cannot pay money into court: 2 Wils. 115.

*Precedents.*

## DECLARATION IN TRESPASS FOR MESNE PROFITS.

(Commencement and conclusion as ante, "*Declaration*," post, "*Trespass*.") For that the deft., heretofore to wit, on, &c. (*supra*), with force and arms, &c., broke and entered divers, to wit, — messuages, &c., (*the premises are to be described as in the declaration in ejectment*), situate and being in parish of —, in the county of —, and ejected, expelled, put out, and amoved, the said plt. from his possession and occupation thereof, and kept and continued him so expelled and amoved for a long space of time, to wit, from the day and year aforesaid until and upon, &c. (*the day on which possession was obtained*), and, during that time, took and had, and received to the use of him, the said deft., all the issues and profits of the said tenements, being of great value, to wit, of the value of £—; whereby the said plt., during all the time aforesaid, not only lost the issues and profits of the said tenements, with the appurtenances, but was deprived of the use and means of cultivating the same, and was forced and obliged to [ \*669 ] and did necessarily lay out and expend divers large sums of \*money, amounting in the whole to a large sum of money, to wit, the sum of £—, in and about the recovering of the possession of the said tenements, with the appurtenances, to wit, at, &c., aforesaid, (*If there have been any particular injury done to the premises, describe it. Add a count de bonis asportatis for corn, &c., carried away, according to the fact.*) And other wrongs, &c. (Conclusion as post, "*Trespass*.")

*Evidence.*

The requisite evidence in this action consists—1, in plt.'s title; 2, his re-entry; 3, the deft.'s liability; and, 4, the damages.

*Proof of Title.*] As this action cannot be maintained until the plt. has obtained a judgment in ejectment, plt. must prove his title by producing an examined copy of the judgment in ejectment; and this will be sufficient evidence of title, whether the action be by the lessor of the plt., or by the nominal plt., against all who are parties to such judgment, and whether it be upon verdict or by default: *Aslin v. Parker*, 2 Burr. 665; B. N. P. 87. It is, however, only evidence of title from the time of the demise laid in the declaration in ejectment; and, therefore, if the plt. seeks to recover damages anterior to that time, it will be necessary for him to give further evidence to substantiate his title: *ib.*; and, as to such evidence, see ante, "*Ejectment*." The judgment in ejectment on the several demises of two will be evidence of title for them in an action of trespass, brought by them jointly: *Chamier v. Llingon*, 5 M. & S. 64; 2 Chit. Rep. 410, s. c.

*Proof of Re-entry.*] A re-entry must be proved, for, without it, the possession is not vested in the plt. Some doubt seems to exist as to what proof of entry will be sufficient; the better opinion, however, seems to be, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time: *Metcalf v. Harvey*, 1 Ves. 248; Adams, 334. Plt. should prove the writ of possession executed, in case the deft. has not voluntarily let the plt. into possession, *Calvert v. Horsfall*, 4 Esp. Rep. 167; or where the judgment has been by default against the casual ejector; B. N. P. 87. Such writ and execution will be proved by an examined copy of the writ and sheriff's return. Where the deft. has entered into the common consent-rule, it does not appear to be necessary, though it is very usual, and

perhaps prudent, to prove the writ of possession executed: and it appears sufficient to prove *the rule to confess lease, entry, and ouster, and that* deft. entered into it: B. N. P. 87. By entering into the rule to confess, the deft. is estopped both as to the lessor and lessee from disproving the entry: *ib.*

*Proof of Defendant's Liability.*] It must be established that the deft. was the trespasser, and in possession, either as tenant or landlord, during the time for which plt. claims the mesne profits: see *ante*, 668. When the judgment in ejectment is against the casual ejector for want of an appearance, and the action for mesne profits is brought against the landlord, plt. should prove that the deft. was landlord when the ejectment was brought, which may be done by showing him to have received the rents and profits accruing subsequently to the day of the demise: and that he received the notice of the service of the declaration in ejectment upon the tenant in possession; but, if the landlord has subsequently promised to pay the rent and costs of the ejectment, this proof will be dispensed with: *Hunter v. Britts*, 9 Camp. 455; *Adams*, 336. The proof of the party's being actually in possession should be established by parties acquainted with that fact. Where the deft. was deft. in the ejectment, \*his being the trespasser will be readily proved by the judgment [\*670] in the ejectment, or by the consent-rule entered into by him. If there be a recovery in ejectment against the wife, the judgment will not be evidence against the husband and wife in this action: *Denn v. White*, 7 T. R. 111; *ante*, 41, 50.

*Proof of Damages.*] The action is for the damages which the plt. has sustained by being kept out of possession, and hence damages must be proved accordingly. The plt. should therefore be prepared to prove the annual value of the premises. The jury are not confined in their verdict to the mere rent of the premises, but they may give such extra damages as they may think the particular circumstances of the case demand: *Goodtitle v. Tombs*, 3 Wils. 126. If he goes only for damages from the day of the demise laid in his declaration in the ejectment, the judgment in ejectment is conclusive as to his right from that time: but he may go for a time preceding the day laid in the ejectment; but he must, in such case, go into evidence of his title from that period, as he would be bound to do in bringing his title by ejectment: *ante*, 668. He can only recover against deft. the mesne profits during the time deft. was wrongfully in possession: *ante*, 668. He can in no case recover beyond the extent of six years; if the statute of limitations be pleaded, *ante*, 668.

The plt. may recover the amount of the taxed costs of the ejectment, but not any extra costs: *Doe v. Davis*, 1 Esp. Rep. 358; *Brook v. Brydges*, 7 Moo. 471; R. & M. 419. But this mode of recovering taxed costs is seldom resorted to, unless where the judgment was obtained against the casual ejector.

The plt. will be entitled to give evidence of any injury done to the premises in consequence of the misconduct of the deft., if such fact have been specially alleged in his declaration: *Adams*, 336. Plt. may recover some damages for his trouble: 3 Wils. 121.

As to the recovery of damages in ejectment under the 1 G. 4, c. 87, s. 2, see *ante*, 456, 7.

Where the plt., in an action for mesne profits, recovers less than 40s., and the Judge does not certify that the title came in question, the plt. will be entitled to no more costs than damages: *Doe v. Davis*, 6 T. R. 593.

We have already seen what deft. may plead, and his evidence should be prepared to support his plea accordingly, or else to rebut plt.'s proofs.

### MONEY HAD AND RECEIVED.

FORM OF REMEDY AND PLEADINGS.] Where a deft. receives money which belongs to plt., or which, in equity and justice, he should not retain, and which ought to be paid to plt., assumpsit or debt lies against him for the amount of it, as for so much money had and received to plt.'s use: 2 T. R. 370; 2 Burr. 1012; 3 B. & P. 169. Assumpsit lies to recover money had and received to the use of the plt.; and, in some cases, though the money have been received tortiously, or by duress of the person or goods, it may be recovered in this form of action, the law implying a contract in favour of the party entitled, 2 Ld. Raym. 1216, 1 B. & C. 418, 2 *ib.* 369, 3 D. & R. 568; as, against a person who has usurped an office, and received the known and accustomed fees of office, though mere gratuitous donations cannot be recovered in assumpsit: 6 T. R. 631. But, though the plt. may, in some cases, waive the tort or trespass, and declare in assumpsit for money had and received, Cowp. 419, yet it cannot, in general, be supported to recover back money paid for the release of cattle distrained, damage feasant; but the party must resort to trespass or replevin; *ib.* 415; 1 Chit. Pl. 96. The assignees of a bankrupt may [\*671] \* recover, as for money had and received against the deft., who took the goods of the bankrupt in execution after an act of bankruptcy, and then purchased the goods from the sheriff under a bill of sale, although no money actually passed: 1 Stark. 194. And where the assignees of a bankrupt, suing for another as trustee, recovered against the sheriff for the escape on mesne process, the party beneficially interested may recover the amount from the assignee, in the form of action: 1 M. & S. 714. Assignees may also declare in assumpsit for money paid by way of fraudulent preference, anterior to the act of bankruptcy: 10 East, 378. And the assignees of a bankrupt may declare for money had and received against a creditor who had levied his debt by *fi. fa.* after the act of bankruptcy: 1 W. Bl. R. 827; 1 Chit. Pl. 306. And, where the deft., having fraudulently induced plt. to sell goods to A., who could not pay for them, and on the nominal re-sale of those goods by A., in which the deft. was really concerned, had obtained himself the money paid on such re-sale, it was held, that the plt. might, in an action for money had and received, recover of the deft. the value of the goods unpaid for by A.: 2 B. & B. 369. And, where the landlord refused to allow the property-tax, and distrained and sold for the whole of the rent, the tenant recovered the amount of the tax in assumpsit for money had and received: 1 M. & S. 609. But a landlord cannot sue the sheriff for money had and received, where the sheriff does not leave a year's rent, according to 8 Anne, c. 14, s. 1; 3 Camp. 260; 2 C. & P. 103. If a contract be *broken*, an action for money had and received, will not lie for money paid under it; an action for the breach of such contract is the proper form of remedy; but, if the

contract has been *rescinded*, it is otherwise, and assumpsit for money had and received lie, see 1 C. & P. 18; as, where, either by the terms of the contract, it was left in the plt.'s power to rescind it, and he does so, or where the deft. afterwards assents to its being rescinded, assumpsit for money had and received lies; but if the contract continue open, he can only recover damages, and must declare specially: 1 T. R. 274; 1 Chit. Pl. 307. And thus, where a horse or goods warranted sound, or of a certain quality, turn out to be otherwise, the vendor must, in general, sue on the warranty or special contract, and cannot maintain assumpsit for money had and received, to recover back the price, or part of it: 7 East, 274, 279; 1 T. R. 136: *post*. And where some act is to be done by each party under a special agreement, and deft. by his neglect prevents the plt. from carrying the contract into execution, the plt. may recover back any money he has paid under it, as received to his use: 7 T. R. 181. Unless the plt. has received benefit in part from the original contract, he should declare specially: 1 N. R. 260, 351-4; 5 East, 449; 7 *ib.* 274; 1 Chit. Pl. 307. Interest cannot be recovered under a count for money had and received, as only the sum really received is recoverable; therefore, if plt. proceed for interest, he must declare specially: 1 B. & P. 306; 2 W. Bl. R. 1078; 4 Esp. Rep. 223. This count will not lie for stock: 2 B. & A. 51. Foreign money may be recovered under the denomination of English: 1 Marsh. 33; 5 Taunt. 228, *s. c.* [See *McLachlan v. Evans*, 1 Y. & J. 380. See 2 B. & Adol. 78, *Scott v. Bevan*, as to estimating foreign money. Title to land cannot be tried in the action; but this rule does not apply to cases where only the past gone rents of land are in question: *Money Penny v. Bristow*, 2 Russ. & Mylne, 117.]

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### *Precedents.*

#### INDEBITATUS ASSUMPSIT FOR MONEY HAD AND RECEIVED.

(The *indebitatus* count in assumpsit is as *ante*, inserting these words :) For so much money by the said deft. before that time had and received to and for the use of the said plt.; and, being so indebted, &c. (Conclusion in assumpsit as *ante*, 139.)

#### INDEBITATUS IN DEBT FOR MONEY HAD AND RECEIVED.

And whereas, also, the said deft., afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, had and received a certain other sum of money, to wit, the sum of £—, of like lawful money, to and for the use of the said plt., and to be paid by the said deft. to the said plt., when he, the said deft., should be thereunto afterwards requested. Whereby, &c. (Conclude as *ante*, 409.)

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### *\* Evidence for Plaintiff.*

[\*672]

The plt. must prove the receipt of the *money* by the *deft.*, and that it was received to his (*plt.'s*) use.

*Proof of Receipt of the Money.*] It must be proved that *money* or *cash* came into the deft.'s hands. Proof of deft.'s receipt of money's worth will not suffice; therefore, the action will not lie for stock: 5 Burr. 2589; 2 B. & A. 51. If a party gives another that which may be readily turned

into money, it may be treated as such in an action for money had and received, Doug. 197, 4 Bing. 178; and, where the property delivered to deft. is saleable, the receipt of money may be presumed, particularly after a lapse of time: *ib.*; 4 T. R. 687; 3 B. & P. 559. A bill of exchange, payable to the drawer's order, is evidence in an action, by the drawer against the acceptor, of money had and received by the latter to the use of the drawer: *Thompson v. Morgan*, 3 Camp. 101. The receipt of provincial notes by the deft., which he has received as money, is sufficient evidence of the receipt of money by him: *Prichard v. Bankes*, 13 East, 20. And, where an insurance-broker has received credit in account with an under-writer, for a loss upon a policy, his principal may maintain this action against him to recover the amount, although he has not actually received it: 6 Taunt. 110; 3 Camp. 199. As to when it lies by assignees of bankrupt, *ante*, 237, 239.

Money had and received will not be supported to recover the value of bank-notes, if it appear that the party found them, *Moyes v. Price*, Chit. Bills, 426; though if not produced at the trial, the receipt of their value will be presumed; *ib.*; *Longchamp v. Kenny*, Doug. 138. It should be shown deft. received some particular or specific sum: 3 B. & C. 626; 5 D. & R. 500.

*Proof of Receipt of Money by Defendant.*] The money must appear to have been received by deft., or his agent, for plt.'s use: 9 East, 378; C. & P. 128; 1 Taunt. 65. Deft. must be the principal; if he appear to be the mere bearer of the money from one party to the other, he will not be liable, *Coles v. Wright*, 4 Taunt. 198; nor will he be liable if he was a mere receiver or collector, 4 Burr. 1985; nor if he were an agent, who has paid over money pursuant to the directions of the party depositing it with him, and without notice of the plt.'s title; but, until there has been a change of circumstances, by his having paid over the money to his principal, or doing something equivalent to it, he remains liable, *Cox v. Prentice*, 3 M. & S. 344; and he always remains liable, if, before any act done by him as to the money, he has received notice from the plt. to retain it: *Edwards v. Hadding*, 5 Taunt. 815; 8 *ib.* 136. An agent's merely passing money in account, or making arrest, without new credit given, fresh bills accepted, or further sums advanced for the principal in consequence of it, is not equivalent to a payment over: Cowp. 565; 3 M. & S. 344; 5 Taunt. 657, 815. The payment must be *bona fide: ib.* Money had and received cannot be maintained against a church-warden to recover back dues which, previous to the commencement of the action, had been paid over to the trustee of a chapel, for whom they were received: *Horsfall v. Handley*, 8 Taunt. 136. Where money was deposited by a bankrupt in the hands of an arbitrator to decide to whom it belonged, and the arbitrator, before a commission issued, and without knowledge of any act of bankruptcy, paid the money over to the person whom he thought entitled to receive it, it was held the assignees could not recover from the arbitrator: *Tope & Nicholls v. Hockin*, 7 B. & C. 101; and see judgment of Lord Tenterden, *ib.* When the action lies against a partner, see 3 Bing. 54; *post*, "*Partner.*" Where money, in litigation between two parties, has, by mutual consent, been paid [\*673] over to a trustee, in trust for the "party entitled to it, it can only be recovered by the party entitled to it from the stakeholder, and



not from the original party who was indebted: 9 East, 373; 2 Camp. 68. After a sale by a sheriff, under an execution, at the plt.'s suit, an action may be maintained against such sheriff for money had and received, without calling the sheriff to return the writ or demanding the money: 3 Salk. 323; 1 Esp. Rep. 263; 3 Camp. 347; 3 B. & A. 696; 1 B. & B. 370.

*Proof that Money was received for Plaintiff's Use.*] It must be shown that, at the time of the receipt of the money, it was received for plt.'s use, for a chose in action is not assignable: 1 East, 103; 3 B. & P. 559. Plt. must be legally entitled to the money at the time of the receipt, and not at the time of the action: *ib.* But, in some cases, where a party has engaged to pay a sum of money over to a third person, the latter may recover it as had and received to his use; and this may be effected by the arrangement between the parties: thus, where A. owes B. £100, and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100: B.'s debt is extinguished, and C. may recover the sum against A.: *p. Buller, J.*, 3 T. R. 180; 3 B. & C. 855; 5 D. & R. 735; 5 B. & A. 228; 4 B. & C. 163; 6 D. & R. 288. In such case however, two ingredients are, it seems, necessary, in order to enable the plt. C. to sue A.: as for money *had and received*: viz. that the debt originally due to him, the plt., from the third person B., should be *extinguished* by the new arrangement, and that the debt due from the deft. to the third party, B., should have been for money had and received, 5 B. & A. 228, *Wharton v. Walker*, 4 B. & C. 163; and the debt due to the plt. from B. is not extinguished, unless there be a communication between all parties, and an express agreement by the plt. to accept the deft. only as his debtor, *ib.*, 3 B. & C. 591, 5 D. & R. 735; and, if the deft. was not originally indebted to the third party, B., as for money had and received, the plt.'s remedy, as it seems, is only by special action of assumpsit on the agreement: *ib.*; and see Chit. on Cont. 184. Where A. sent bills to B., his banker, directing him to pay part of the produce to C., and B., refused to act upon the order, but received the produce of the bills, it was held, that C. could not maintain an action against B. for so much money had and received to his use, since, as between the plt. and deft., there was no privity, either express or implied: *Williams v. Everett*, 14 East, 582. But, where money was paid into a banking-house, for the purpose of taking a particular bill then lying there for payment, although the banker's clerk said at the time that he could not give up the bill, but took the money, it was held to be money had and received to the use of the owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor, who had paid the money: *De Bernales v. Fuller*, *ib.* 590, *in notes*. A person cannot, in general revoke an authority to his debtor to pay the debt to a third party, the creditor of the former, after the debtor has given a pledge to such third party that he will pay the money according to the authority: *Hudson v. Anderson*, 3 B. & C. 842; 8 Moo. 10. As to the effect of a transfer in a banker's books, &c., see 1 R. & M. 68; Cowp. 565; Chit. on Cont. 185.

This action may also be maintained on a *consideration* which has *failed*, or on a *contract rescinded* or not *performed*, as on the purchase of an estate, to recover a deposit, if the title be defective, 2 W. Bl. Rep. 1078, 1 Esp. Rep. 268, 4 *ib.* 221: or the seller is not prepared to make it out by the time prescribed, 4 Taunt 334, 1 Esp. Rep. 150; or there be

any other circumstances entitling the plt. to rescind the contract, and which he has rescinded accordingly. The plt. must prove the defect in the title, *ante*, 169, &c., and such other circumstances entitling him to a return of the money. Each party must be put in *statu quo* to sustain an action on this ground: therefore, if the purchaser of premises [\*674] has taken possession of them, he will \*be considered to have adopted the contract, and cannot disaffirm it; in such case the plt. must resort to a special action on the agreement; 5 East, 449. Where the agreement was by parol, and money was paid by the plt. to the deft. for the purchase of leasehold premises, under a misapprehension, by both parties that the deft. was the legal representative of the lessee, though it turned out afterwards that he was not, it was held, that the money might be recovered as paid by mistake: 6 T. R. 606. And, where a party, under an agreement to purchase some premises, took possession of them, and the vender evicted him before the sale was complete, it has been held in equity, that the purchaser was not bound to complete his agreement; 3 Mer. 124; Chit. on Cont. 189. On the sale of a horse or other chattel, with a warranty, or other contract, which the deft. has broken, if the plt. has rescinded the contract in a *proper and reasonable time*, by returning, or offering to return, the horse or chattel, on proof of those facts, this action lies: *ante*, 536. Where an annuity is defective, and the deeds are set aside, the consideration-money is recoverable back in this form of action: *Shore v. Webb*, 1 T. R. 732. And this, where one of several securities, securing the annuity, fails: *Scarfield v. Goulard*, 6 East, 241. The deeds should be produced and proved, and the rule of court, setting them aside, produced: 2 Stark. Ev. 215, (n.) But the grantor has this remedy, even though the annuity has not been set aside, if the knowledge that the memorial is defective has been communicated: 3 Taunt. 56. But deft. may deduct payments made on the annuity: 3 East, 12; 4 Esp. Rep. 196; Chit. on Cont. 189. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project; it was held, that each subscriber might, in this action, recover the whole money advanced by him, without deduction of any part towards the payment of the expenses incurred: *Nockells v. Crosby*, 3 B. & C. 814; 5 D. & R. 751. Where A. having sold B. shares in a projected joint-stock company, and the undertaking having been abandoned before any thing was done pursuant to the project, it was held, that B. might recover from A. the money paid for the shares: 3 Bing. 5. And the mother of an illegitimate child may recover, in this action, money deposited with the officers to meet any charge to which the parish might be liable in respect of the child, 3 Bing. 424; so it lies where the child dies before expense is incurred: 3 Moo. 211.

Money obtained by *fraud* or *misrepresentation* is also recoverable in this action, and it is no answer that the deft. would be entitled to it in equity: *Crockford v. Winter*, 1 Camp. 124. Thus, where the deft. had fraudulently colluded with J. S., who was in insolvent circumstances, to obtain goods from the plt. and the proceeds of such goods eventually came to the deft.'s hands, in satisfaction of a debt due to him from I. S., it was held that the plt. was entitled to recover in an action for money had and

received: *Abbott v. Barry*, 5 Moo. 98; 2 B. & B. 369, *s. c.*; 3 Taunt. 274. So it lies where goods, not liable to seizure, are seized by a revenue officer, who extorts money to release them, *Irving v. Wilson*, 4 T. R. 465; or where a sheriff extorts a larger fee than he has a right to: *Dew v. Parsons*, 2 B. & A. 568. And this action is maintainable to recover money in the hands of an overseer, levied on a conviction which has been quashed: *Feltham v. Tarry*, 1 T. R. 387. It also lies to recover money where the person who received it acted under a void authority: *Robson v. Eaton*, 1 T. R. 59; Cowp. 419.

This action lies to recover money extorted or obtained by *oppression*; and, thus, it is maintainable against a lessee of tolls, who improperly exacts \*from the plt. more toll than ought to be taken, [\*675] *Wightw. 22*, 2 B. & A. 206, 4 *ib.* 200; or for a fee paid by a publican to a justice of the peace for his license: 2 B. & C. 729, *ante*, 674; 4 D. & R. 283. It lies to recover the excess of interest taken from the plt. on an usurious bargain, *Doug. 697, n.*, Str. 915; or money paid by the plt. a bankrupt, as an inducement to the deft., his creditor, to sign his certificate, *Doug. 472, 697*; or money paid by A., the plt., to B., in order to compromise a *qui tam* action of usury brought by B. against A., on the ground of an usurious transaction between the latter and one E.: 8 East, 378.

This action sometimes lies for money paid and had and received by deft. by *mistake*. Where a person with the full knowledge of the facts, voluntarily pays a demand unjustly made on him, though attempted to be enforced by legal proceedings, it will not be considered as paid by compulsion, and he cannot recover it, though he protested at the time of payment: 1 Esp. Rep. 279-84; 2 *ib.* 572, 723; 3 B. & P. 520; 5 Taunt. 147; 1 M. & S. 610-11; 4 B. & C. 290; 6 D. & R. 288; Chit. on Cont. 190. But, if a party making a payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory, payment, and may be recovered back: [*Shaw v. Woodcock*, 9 D. & R. 889, *s. c.* 7 B. & C. 73.] If a party pay money under a mistake of *law*, he cannot recover it back; but if he pay money under a mistake of the real facts, and no laches are imputable to him, (in respect of the omitting to avail himself of the means of knowledge within his power,) he may recover back such money: *p. Bayley, J., Milnes v. Duncan*, 6 B. & C. 677. Where plt. paid to an attorney the amount of his bill, which was afterwards taxed, and reduced considerably thereby, he cannot recover for the difference: 2 Stark. 85. A settlement of accounts will have the same operation as payment: 4 B. & C. 281; 6 D. & R. 288. A person discounting a forged money-bill may recover back the money in this action: *Jones v. Ryde*, 5 Taunt. 187. So, in the case of forged bank-notes: *ib.* And thus, where a banker by mistake paid a bill for the honour of the customer whose name was forged, but, discovering the mistake, gave notice thereof to the holder in sufficient time to enable him to give notice of nonpayment to the indorsees, it was held that the money was recoverable from the holder: *Wilkinson v. Johnson*, 3 B. & C. 428; 5 D. & R. 403, *s. c.* And, where the plts., who were brothers, discounted for the deft., a bill-broker, a bill, which the latter did not indorse, and the signatures of the drawer and acceptor, the latter of whom kept an account with the plts., were forged, it was held, that the deft. was liable to refund the money, and that the fact of his having paid

over the amount to the indorsee, for whom he was broker, did not exonerate him: *Fuller v. Smith*, R. & M. 49; Chit. on Cont. 191. But, where the party who pays the money has the means of knowing, or is bound to know, the forgery, or where, by his delay in discovering the forgery, he has deprived the holder of the means of resorting to other parties, he cannot maintain this action. Thus bankers who pay a forged acceptance of a customer, made payable at their house, to a *bona fide* holder, and who do not discover the forgery till it is too late for the holder to give notice of the nonpayment, cannot recover back the amount from him: 6 Taunt. 76; 3 B. & C. 435; 5 D. & R. 735. And, where the drawer of a bill accepts and pays it under a mistaken notion, that the bill is drawn by his creditor, he cannot recover the amount from a *bona fide* holder, on the drawing proving to be a forgery: 3 Burr. 1354; 3 B. & C. 434; 5 D. & R. 735; 3 Esp. Rep. 60. Where the captain of a king's ship, which brought home treasure from abroad, for which he is allowed freight, believing that the admiral was entitled to a share, paid him a third, but discovering afterwards that the admiral was not so entitled, brought [ \*676 ] his action to recover it back, it was held not to lie, \**Brisbane v. Dacres*, 5 Taunt. 143. But if an underwriter, supposing a ship to be lost on which he had underwritten a policy, has paid for a total loss, and she afterwards returns to port, he has a right to recover back his money, he having paid it under a belief that the ship had been lost; *Moses v. McFerlane*, 2 Burr. 1010; *Bilbie v. Lumley*, 2 East, 469; *Gomery v. Bond*, 3 M. & S. 378. Where a person pays money which the law would not have compelled him to discharge, but which in justice he ought to pay, he cannot maintain this action to recover it, 1 T. R. 286, 2 W. Bl. R. 825, 2 Burr. 1012, and that, notwithstanding the demand arose out of an illegal transaction: 6 Esp. Rep. 256. The action does not lie to recover money paid on a legal judgment, 7 T. R. 269, 2 Camp. 63; or money mistakenly paid into court, 2 T. R. 545; or levied under an irregular *fi. fa.*; 4 Camp. 58.

Where the action is brought to recover money paid by mistake, the plt. must go into evidence of the whole transaction and the circumstances under which he paid it; and it must be clearly made out that the payment was made in consequence of the plt. supposing something to have taken place, or some fact to have happened, which turns out to be otherwise than he supposed. Where the demand is connected with any instrument or writing, the latter must be produced and proved.

Money paid on an *illegal contract* may sometimes be recoverable in this action, when the contract remains executory, and the plt. dissents, and in disaffirmance of it, endeavours, by his action, to recover his money. As, where A., in consideration of £210, gave B. a bond for the payment of an annuity of £100, until the hop duties should amount to a certain sum, and it was held that A., who brought his action before that event happened, was therefore entitled to recover, on the ground that the contract still remained executory, *Tappenden v. Randall*, 2 B. & P. 467; so in other cases of wagers, where they have been determined before the risk began: *Aubert v. Walsh*, 3 Taunt. 277; *Burk v. Walsh*, 4 ib. 290; Doug. 470; 8 East, 381, n.; Chit. Cont. 193. A distinction, however, appears to prevail where the contract is merely illegal, or where it is in furtherance of some object *malum in se*, or grossly immoral, in which case, it is said the court will not interfere: *Farmer v. Russell*, 1 B. &

P. 298; *Aubert v. Mage*, 2 B. & P. 371; *Cannon v. Boyce*, 3 B. & A. 179.

Where money is deposited in the hands of a stakeholder, upon the event of an illegal wager, or one of a foolish nature, and such as the court ought not to be called on to try, the party making the deposit may recover it back, if he demand a return before the event be decided, 1 B. & A. 683, or any time before the money had been paid over: *Cotton v. Thurland*, 5 T. R. 405; *Bate v. Cartwright*, 7 Price, 540; 4 Taunt. 474; R. & M. 214, n.; Chit. on Cont. 193. Money deposited in the hands of a stakeholder, upon the event of a legal wager, cannot be recovered back after the party who has deposited the money has lost the wager: 4 Camp. 37.

The money is also recoverable where the plt. is not in *pari delicto* with the deft.: *Jacques v. Withy*, 1 H. Bl. 65; *Williams v. Hedley*, 8 East, 378.

The agent of a party to an illegal contract, who receives money under it to the use of his principal, cannot set up the illegality of the transaction in an action brought against him by his principal: *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, *ib.* 296; but see *McGregor v. Lowe*, R. & M. 37. If an illegal contract be executed, and both parties are in *pari delicto*, no action lies to recover money paid under it; *Andree v. Fletcher*, 3 T. R. 266; *Rowson v. Hancock*, 8 T. R. 575; 1 East, 96; 1 M. & S. 500; 8 Taunt. 492.

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\*Evidence for Defendant.

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The evidence for deft. may consist in rebutting the plt.'s necessary proofs, which may be readily collected from the above. For other defences, see the various titles in the work.

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MONEY LENT.

FORM OF REMEDY AND PLEADINGS.] Where a person lends money to the deft., or to another on his account, and at his request, the law presumes an undertaking on his part to repay it, and assumpsit or debt will lie against him for the amount: 2 Ld. Raym. 1216; 2 W. Bl. R. 827; B. N. P. 131; Com. D. *Debt*, A. 4; Str. 1089. Money lent to the deft. himself may be recovered under the common count for money lent, though delivered to a third person at the deft.'s request: 8 T. R. 328. But, where the money is lent to a third person at the request of the deft., and both are liable to repay it to the plt., the one on the loan, and the other by virtue of a collateral undertaking in writing, plt. must declare against him specially: 1 Saund. 211, a. b. A declaration against a husband for money lent to his wife, at his request is maintainable: 3 Wils. 388. The common count is not sustainable if the loan was effected by a transfer of stock, which is not money: 5 Burr. 2589. Assignees of a bankrupt, 2 Chit. Rep. 225, or executors, 3 B. & A. 360, may sustain this count for money lent by them as such.

*Precedents.*

## INDEBITATUS ASSUMPSIT FOR MONEY LENT.

(The *indebitatus count in assumpsit* is as *ante*, 139, inserting these words:) For so much money by the said plt., before that time lent and advanced to the said deft., at his special instance and request. And, being so indebted, &c. (Conclusion in *assumpsit* as *ante*, 189.)

## INDEBITATUS IN DEBT FOR MONEY LENT.

And whereas, also, the said plt., afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, at the like special instance and request of the said deft., lent to the said deft., and the said deft. then and there borrowed of the said plt., a large sum of money, to wit, the sum of £—, of like lawful money, to be paid by the said deft., to the said plt., when he, the said deft., should be thereunto afterwards requested. Whereby, &c. (Conclude as *ante*, 409.)

EVIDENCE FOR PLAINTIFF.] The plt. must prove a loan of money to the deft., or a third person at his request. It must appear that the money was advanced as a loan; and it would not be sufficient to establish a loan to prove the payment of money to the deft., as it is open to the presumption that it was paid for some other purpose, viz.:—that it was paid in liquidation of an antecedent debt: *Welsh v. Seaborn*, 1 Stark. 474. Unless it appear that there were many transactions between the parties, or an application by the deft. to borrow money, or any other transaction which would imply a loan: *Cary v. Gerrish*, 4 Esp. Rep. 9. Where money is advanced by a parent to a child, it appears the presumption is, that such advance was by way of gift, and not as a loan: 4 B. & C. 71; 6 D. & R. 68. An unstamped slip of paper, with £100, has been held evidence of money lent: *Childes v. Boulnoir*, D. & R.; N. P. C. 8; *Israel v. Israel*, 1 Camp. 499; 1 Esp. Rep. 426. Plt. may prove a loan of money to the deft. by production of his check on his banker's, [\*678] payable \*to the deft. and paid by the bankers, if it is proved to have been paid to him, or if it has the deft.'s name indorsed on it, but not otherwise, as the use of a name in the body of a check is quite arbitrary. *Egg v. Barnett*, 3 Esp. Rep. 196. So, a promissory note, given by the deft. to the plt. will be evidence: *Story v. Atkins*, 2 Str. 719; 2 Phil. Ev. 121; and see further, *ante*, 278, as to when a bill is evidence of money lent.

EVIDENCE FOR DEFENDANT.] The deft.'s evidence will consist in rebutting plt.'s proofs, as by showing the money advanced was not a loan, *ante*, 677. Deft. may show that the money was lent for the *express purpose* of carrying on something illegal, as to settle losses on stock-jobbing transactions, &c., 3 B. & A. 179, 3 Taunt. 6, or to game with: *ib.*; 1 W. Bl. R. 261; *sed vide* 2 Str. 1249; 2 Burr. 1077; 3 Camp. 120. It is no defence to show that plt. holds a security or pledge for the repayment of the loan: Str. 919; 2 Ld. Raym. 753; 2 Stark. R. 73; 2 T. R. 376; 6 M. & S. 24. As to other defences, see various titles throughout the work.

## MONEY PAID.

FORM OF REMEDY AND PLEADINGS.] Assumpsit lies to recover money paid to the use of the deft., the law implying a contract in favour of the party entitled to have a return of it: 2 *Ld. Raym.* 1216. Debt may also be supported in most cases: *Com. D. Debt, A.* The common count for money paid is proper, where money has been paid at the express request of the deft., and, in some cases, even without such request, 8 *T. R.* 310, 614, 3 *Camp.* 168, *Chit. Pl.* 304; though the request should always be stated in pleading: 1 *Saund.* 264, *n.* 1. The count is not sustainable unless money actually passes: 2 *B. & A.* 51. Where the plt. has paid money in the nature of unliquidated damages or costs, or it cannot be considered as strictly paid for the use of the deft., 5 *Esp. Rep.* 3, 4 *id.* 223, or where the plt. has not actually made a payment in money, but has merely given a security, or his goods have been sold under a distress, the declaration must be special for not indemnifying, &c.: 3 *East*, 169; 11 *id.* 52; 2 *B. & A.* 51; 1 *Chit. Pl.* 305. Where the deft. had executed a charter-party, under which the cargo was to be sent alongside the ship, at the merchant's expense, the captain rendering the usual and customary assistance with his boats and crew, some of the cargo lying about thirty yards from the edge of the wharf, and the captain applied to the deft.'s factors for labourers to remove it into boats, and the factor having refused, saying he would abide by the charter-party, the captain hired labourers for the purpose, it was held that the expense, &c., so incurred, might, notwithstanding the charter-party, be recoverable under the count for work and labour, or money paid: *Fletcher v. Gillespie*, 3 *Bing.* 635. If a surety take a bond, or other specific security from his principal, he cannot resort to the count for money had on the implied assumpsit, 2 *T. R.* 100.

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*Precedents.*

## INDEBITATUS ASSUMPSIT FOR MONEY PAID.

(The *indebitatus* count in *assumpsit* is as *ante*, 139, inserting these words:) For so much money by the said plt., before that time, paid, laid out, and expended, to and for the use of the said deft., at his like special instance and request. And, being so indebted, &c. (Conclusion in *assumpsit* as *ante*, 139.)

## INDEBITATUS IN DEBT FOR MONEY PAID.

And whereas, also, the said plt. afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, had paid, laid out and expended, a certain other sum \*of money, [\*679] to wit, the sum £—, of like lawful money, for the said deft., and at his like special instance and request, and to be paid by the said deft. to the said plt., when he, the said deft., should be thereunto afterwards requested. Whereby, &c. (Conclude as *ante*, 409.)

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EVIDENCE FOR PLAINTIFF.] The plt. must prove that he paid money at deft.'s request.

*Proof that the Money was Plaintiff's.]* It must appear that the money paid was plt.'s. Thus, an under-tenant, whose goods have been distrained and sold by the original landlord, for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for, immediately on the sale under the distress, the money paid by the purchaser vests in the landlord, in satisfaction of the rent, and never was the money of the under-tenant: *Moore v. Pyrke*, 11 East, 52.

*Proof of Payment in Money.]* Plt. must prove an actual payment of money, as the giving a security, as a bond, warrant of attorney, &c., is insufficient for this purpose: *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & A. 51. And it has been held, that the receipt of stock cannot be considered as the receipt of money, in an action for money, had and received: *Jones v. Brindley*, 1 East, 1.

*Proof of Payment at Defendant's Request.]* No person is entitled to recover money which he has of his own accord paid for another, unless it has been paid at the party's request, by his direction, or is money which he is compellable by law to pay on deft.'s account, by reason of some legal claim which could not be resisted. It will, therefore, be insufficient, generally, merely to prove a payment made by him, on account of the deft.; he must show an order or request by the deft. to make the payment, or that the act was subsequently required by him: see 1 T. R. 20; 8 T. R. 813, 613; 10 East, 264; 1 Saund. 264. Thus, where two parishes had been united, and long paid a joint sexton, and afterwards one claimed a right of electing a separate sexton, it was held that the other parish could not, after notice, recover a moiety of the sum paid as the sexton's salary, as money paid to the use of the succeeding parish: *Stokes v. Lewis*, 1 T. R. 20. Thus, where a broker purchases stock to fulfil a contract entered into by him for his principal, but which his principal refuses to make good, it was held he could not recover the money as paid to his principal: *Child v. Morley*, 8 T. R. 610. And thus, where the party to whom the stock was contracted to be sold, on the deft.'s refusal to transfer, bought the stock himself, and brought assumpsit for money paid, to recover the difference in the price of the stock, it was held that the action could not be maintained: *Lightfoot v. Creed*, 8 Taunt. 268.

But there are some cases where the law will imply that the money was paid at deft.'s request. Thus, where a husband goes abroad, and leaves his wife, who dies in his absence, a third person, who voluntarily pays the expenses of her funeral, suitably to the rank and fortune of the husband, though without the consent of the husband, may recover from him the money so paid, especially if such third person be the father of the wife: 1 H. Bl. 90. As to what expenses plt. may recover in an action on a bill, *ante*, 280-1. Where the deft. is compellable by law to pay the money, his assent will be implied; as, where an under-tenant's goods are distrained on account of rent due by the deft., to whom he was tenant to head landlord, and, to redeem his goods, he paid the rent in arrear, proving the distress made, the taking his goods, that it was for rent due by the deft., and that he paid the rent to redeem his goods, [\*680] the plt. will be entitled to recover, *Exall v. Partridge*, 8 T. R. 308, and see 4 T. R. 512, 3 Camp. 168; and it appears



to be unnecessary for the plt., in such case to prove that he resisted the distress, if valid, in order to entitle him to recover: see 5 Taunt. 615; 4 *ib.* 189; 1 R. & M. 116. If a carrier by mistake deliver to B. goods consigned and sold to C., and B. appropriate the goods, and the carrier on demand, without action, pays C. their value, the carrier may recover it against B., as money paid to his use: *Brown v. Hodgson*, 4 Taunt. 189; *sed vide* 4 Camp. 81. A surety, who pays the whole sum for which he was jointly liable, may recover the whole against the principal or a proportionate part against his joint surety: 2 T. R. 105. Plt. must, in such case, prove the execution of the bond, or other instrument, by which he became deft.'s surety, and that he became so at his request, and that he was called on to pay the money, and gave deft. notice to pay it: 8 T. R. 310; *Beard v. Boulcot*, 3 B. & P. 235; 2 *ib.* 268; 5 East, 225. Bail may recover against the principal any expenses they may have incurred in taking him into custody: 5 Esp. Rep. 171. If A. become a co-surety with B., at B.'s request, and B. pay all the money, he cannot recover from A. his aliquot part of the debt, 2 Esp. Rep. 478; and, if two, several sureties pay the debt, they cannot sue jointly the other sureties for reimbursement: 3 B. & P. 235; 2 T. R. 282. Bail suing co-bail for contribution must prove the judgment: 1 Marsh. 6. Where a judgment is recovered in an action on a contract or specialty, against several defts., and one pay the whole demand, he may recover against the others a contribution: 8 T. R. 186; 1 Camp. 343; 2 *ib.* 452; and see 4 Moo. 340; *aliator in tort, ib.* If two joint agents be imposed on, and, in consequence, pay money to a wrong person, and one is afterwards obliged to pay it over again to the person legally entitled to receive it, he cannot recover from his co-agent his share of the money so paid: *Mackreath v. Mayetson*, Chit. on Cont. 181; see *ante*, 675-6, as to recovery of money paid by mistake.

**EVIDENCE FOR DEFENDANT.]** This will consist in rebutting the plt.'s proofs, in showing that *plt.* did not pay *money* at the deft.'s request. The deft. may prove that the money was paid *expressly* for an illegal purpose. It is a general principle, that if two persons engage in an illegal transaction, one who pays the share of the other for him, without his express authority, cannot maintain an action for money paid: 4 Taunt. 165; 3 Taunt. 6; 3 B. & A. 179; and see 2 B. & P. 371; 7 T. R. 630; 6 *ib.* 405; *ante*, 676; *sed vide* 3 T. R. 418; 2 Wils. 309. As to other defences, see various instances throughout the work.

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## MONEY, PAYMENT OF INTO COURT.

**EFFECT OF.]** The payment of money into court is, in general, considered as an acknowledgment of the plt.'s right of action to the amount of the sum brought in, *Blackburn v. Scholes*, 2 Camp. 342, 2 T. R. 275, which the plt., therefore, is entitled to receive, whether he proceed in the action or not, and even though he be nonsuited, or have a verdict against him: 2 Salk. 597; 2 Str. 1037.

The payment of money into court is an admission of the original contract, or other cause of action, as stated in the declaration; and the only

remaining question to be determined is the amount of the damage; it is regulated by the same rules as a judgment by default: *ante*, 586; 5 Burr. 2640; 1 Esp. Rep. 347. Thus, if goods have been sold to the deft. by sample at a stipulated price, he cannot, after payment of money into court, in an action of *indebitatus assumpsit*, insist upon any defect in [\*681] the goods, \**Leggett v. Cooper*, 2 Stark. 103; and therefore, if a purchaser mean to insist on such an objection, he ought to return the goods, *ib.* In an action on a bill of exchange, where a party pays money into court generally, he dispenses with the regular proof of the party's handwriting, 2 H. Bl. 374, Pea. Rep. 15, and cannot object to the insufficiency of the stamp on which the bill is drawn: 3 Camp. 40; *ante*, 277. So, in an action on covenant, he admits the execution of the deed, 2 Camp. 357, 2 T. R. 275; and, in an action on a promise to pay a third person's debt, he cannot object to its invalidity under the Statute of Frauds: *Middleton v. Brewer*, Pea. Rep. 15. So, where two breaches were assigned in one count of a declaration upon a contract, and the deft. paid money into court upon one of them; it was held that he thereby admitted the whole contract, as set out in such count. And, after a payment of money into court by a deft., in an action brought against him on the 2 and 3 Edw. 6, c. 13, by a farmer of tithes, he cannot object to the plt.'s title to the tithes, as he has thereby admitted the plt.'s right generally, and has reduced it to a mere question of the amount of damages: 4 Price 38. Payment of money into court is a conclusive admission of the plt.'s right to sue, 5 Esp. Rep. 19, and of his right to the character in which he sues: 2 Camp. 441.

But paying money into court appears to be an admission of a legal demand only, 1 T. R. 464; and, if the declaration contain a legal and an illegal demand, the money paid in shall be applied to the legal demand only: 1 B. & P. 264. And beyond the amount of the sum brought in, it is no acknowledgment of the plt.'s right of action, 1 T. R. 464, 3 *ib.* 657, 4 *ib.* 597; consequently it does not deprive the deft. of the benefit of the Statute of Limitations as to the residue of the plt.'s demand; 4 D. & R. 682; 2 B. & C. 10. So, in actions of trespass against justices of the peace, &c., for acts done by them *ex officio*, bringing money into court seems to be no admission of the right of action, 13 East, 202-3. And where money has been paid into court short of the plt.'s demand, and it is taken out of court, evidence is admissible to show *quo animo* it was done; and it is not to be taken conclusively as an admission that the rest of the demand was unfounded: Tidd. Where a limitation has been annexed to the real contract, the effect of which is under certain circumstances, to prevent the plt. from recovering more than a specified sum, the deft., although he has paid money into court generally, may prove the limitation, and show that plt. is not entitled to recover more than he has paid into court, *Clarke v. Gray*, 6 East, 564, *ante*, 332; and the payment of money into court does not admit the average price alleged in the declaration to be paid for the price of goods sold to the deft. 2 B. & A. 116; or to preclude the deft. from availing himself of his infancy: 2 Esp. Rep. 482, *n.* In an action on a policy of insurance, the court, under particular circumstances, allowed the deft. to give evidence of the fraud, notwithstanding he had paid the money into court; 3 B. & P. 556; and see 2 M. & S. 106; 2 Stark. 103. [See further as to the effect of a payment into court, *Reid v. Dickens*, 2 Nev. & M. 369. *Walker v. Rawson*, 5 C. & P. 486; 1 M. & Rol.

250; *Monger v. Smith*, 1 Nev. & M. 449; 4 B. & Adol. 673. *Letchmere v. Fletcher*, 1 Crom. & Mees, 623. 3 Tyr. 450. *Bulwer v. Horne*, 1 Nev. & M. 117, 4 B. & Adol. 192. *Reid v. Dickens*, 5 B. & Adol. 499; 2 Nev. & M. 369. *Ravenscroft v. Wise*, 1 Cro. Mee. & R. 203.]

**PROOF OF.]** This is effected by a copy of the rule for the payment of the money into court: *Israel v. Benjamin*, 3 Camp. 40. This copy of the rule is served on the plt.'s attorney by the deft.; proof should, therefore, be given by the plt., that the copy produced in evidence was served on the attorney in the course of the cause; that it was left at the office of plt.'s attorney, by the deft. or his clerk: *Esp. Ev.* 32. The production by the deft. of a rule to pay money into court, is not, according to the Common Pleas practice, such evidence as to give the plt.'s counsel a right to reply: 2 Saund. 267.

[As to the kind of cases in which money may be paid into Court, see *Hodges v. Litchfield*, 3 M. & Scott, 201; 9 Bing. 713.]

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MORTGAGE.—See EJECTMENT BY MORTGAGEE, *ante*, 473-4.

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\*MORTGAGE DEED, ACTION ON. [\*682]

**FORM OF REMEDY, AND PLEADINGS AS TO.]** Debt lies on mortgage-deeds for the payment of money: *Cro. El.* 268; 895; *Com. D. Debt, A.*; 1 Saund. 282, *n.* 1, 276. So does covenant, whether for the payment of money or otherwise. But debt is preferable, when the demand is for money, because the judgment thereon is final, and there is no occasion to execute an inquiry. Debt on the covenant is also preferable to debt on a mortgage-bond, conditioned as well for payment of the money as performance of covenants in the mortgage-deed, because, in the latter case, damages must be assessed under the 8 and 9 W. 3, c. 11, s. 8; 10 East, 407. In case of a devise of the mortgagee's interest, the action must be brought in the executor's name: 8 Taunt. 227.

In declaring on the mortgage-deed, though usual, it is not necessary to state more than the mere covenant broken; the grant, *habendum*, or proviso, need not be stated. The premises should not be described at length, *ante*, 622. See further, as to declarations on leases, *ante*, 621-2, and *ante*, "Debt."

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*Precedents.*

DEBT ON MORTGAGE-DEED FOR PRINCIPAL AND INTEREST.

For that whereas, heretofore, to wit, on, &c., at, &c., by a certain indenture then and there made between the said plt. of one part, and the said deft. of the other part, which said indenture, &c. (*profert, as ante*, 624.) After reciting, as therein is recited, the said deft. for the considerations therein mentioned, did for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said plt., his executors, administrators, and assigns, that he, the said deft., his heirs, executors, or administrators, or some or one of them, should and would well and truly pay, or cause to be paid, unto the said plt., his executors, administrators, or assigns, the said sum of £—, and lawful interest for the same, upon the — day of —, A. D. — according to the true intent

and meaning of the said indenture, as by the said indenture (reference being thereunto had,) will, amongst other things, more fully and at large appear. Nevertheless, the said plt., in fact saith, that the said deft. did not nor would well and truly pay, or cause to be paid, unto the said plt. the said sum of £—, and lawful interest for the same, on the said — day of —, A. D. —, but therein failed and made default; and there is now due and owing from the said deft., to the said plt., for and on account of the said sum of £—, and interest thereon, a large sum of money, to wit, the sum of £—, of lawful, &c. above demanded, to wit, at, &c., aforesaid, whereby an action hath accrued to the said plt., to demand and have of and from the said deft. the said sum of £—, above demanded. Yet, &c. (*Common conclusion in debt, as ante, 409.*)

See precedent of suggestion on 8 and 9 W. 3, c. 11; on a judgment by default of breaches on a mortgage-bond, Tidd, 6 ed. 249; 3 Chit. Pl. 1276.

### Evidence.

This will depend on the issue raised by deft.'s pleas, see *ante*, 626; as to proving the deed under *non est factum*, see "*Deed.*"

NECESSARIES.—See *ante*, 580-3.

[\*683] \*NEGLIGENCE.—See AGENT;—ATTORNEY;—CARRIER;—  
NUISANCE.

NE UNQUES EXECUTOR, &c.—See *ante*, 510-1.

## NEW ASSIGNMENTS.

WHEN TO BE ADOPTED.] New assignments usually occur in actions of trespass and replevin; sometimes, however, in trespass on the case, assumpsit, or in other forms of action, whether *ex delicto* or *ex contractu*: Steph. P. 244.

Where the declaration is conceived in very general terms, and the deft. has committed two assaults, and one of these assaults is justifiable, being committed in self-defence, whilst the other is without legal excuse, and the action is brought for those which are not justifiable, but the deft. affects to suppose that the first is the assault intended, and pleads *son assault demesne*, the plt. should make a new assignment, by stating that he brought his action, not for the first, but for the second assault, to correct the mistake occasioned by the generality of his declaration: Steph. Pl. 259; 1 Saund. 299, *a. n.* 6. And, if plt. were arrested on a warrant granted previously to the issuing or delivering of the writ, and, in an action for assault and false imprisonment, the deft. justify under the writ, the plt. should new assign. And so, if the plt. were legally arrested at first, but detained, after being discharged by the person at whose suit he was

in custody, and, in an action for assault and false imprisonment, the deft. justify under the writ upon which the plt. was arrested, the plt. should new assign: *ib.* But, if there are as many counts as there were assaults, &c., and some of them cannot be justified, the plt. may prove those without a new assignment; and it would often be injudicious in such cases to new assign; for, where the declaration contains as many counts as there are assaults, &c., as, where there have been two assaults, &c., and there are two counts, and the deft. pleads the general issue to the whole declaration, and a justification to one of the counts, the plt. had better put the justification in issue, and, in case the deft. proves it, give evidence of the second assault upon the second count, than make a new assignment, as, if the plt. fail in the proof of the allegations in the new assignment, he cannot afterwards have recourse to the second count, because, by the new assignment, he acknowledges that one of the assaults, &c. is justified, and has therefore abandoned one count, and relies upon the assaults, &c. in the new assignment; therefore, he cannot avail himself of one and the same act of assault, &c., both to the new assignment, and on the second count; but, if the plt. can prove two assaults, &c., besides that which he has waived, he might do so upon the second count: 1 Chit. Pl. 545; 1 Saund. 299. And if, in case for the publication of a libel, without mentioning the particular person on whom it was published, the deft. has pleaded that he published it lawfully as to members of a committee of the House of Commons, and the plt. proceeds for a publication to other persons, not members of the committee, he should new assign such illegal publication: 1 Saund. 133; 2 Camp. 175. Where a person has two causes of action for breach of contract, for one of which he has already obtained a judgment, and to an action for the other the deft. pleads the judgment recovered, the plt. should new assign, and \*show that [\*684] the action was brought for a different breach of contract from that for which the judgment pleaded had been obtained; and, in all other cases, where the deft. applies his justification to a different cause of action from that to which it is applicable, the plt. must new assign: 6 T. R. 607; 3 B. & C. 235. [See *Williams v. Moor*, 11 Mees. & W. 256. In debt, with several counts, plea, that the defendant had paid to the plaintiff several sums, in the whole amounting to a large sum, to wit, the amount of the several debts in the declaration alleged; held, that the plaintiff need not new assign, but was entitled to recover the balance between the amount of debt proved and payment made: *Freeman v. Crafts*, 4 Mees. & W. 1; S. C. 6 Dow. P. C. 698.]

New assignments are also adopted for the purpose of ascertaining, with greater precision and exactness, the place or time, which has been alleged only generally in the declaration. Thus, if the plt. declare in trespass for breaking his close in a certain parish, without naming or farther describing the close, if the deft. have any freehold in the same parish, he may plead that the close in question was his own freehold; and it will, in such case, be necessary for the plt. to new assign, alleging that he brought his action in respect of a different close from that claimed by the deft. as his freehold; and, in this case, he must, in his new assignment, either give his close its name, or otherwise sufficiently describe it: Steph. Pl. 246; Com. D. Pleader, 3 M. 34.

And if the deft., professing to answer the whole declaration, justify only part of the trespass for which the action is brought, the plt. should

new assign as to the residue, and also traverse the justification, if he doubt the truth of it. As, where the deft. pleaded that the house in the declaration was called C. house, and one of the closes *Blackacre*, and the other *Whiteacre*, and that they were his freehold, the plt. traversed that C. house and *Blackacre* were the deft.'s freehold, and new assigned the trespass in twenty acres other than *Whiteacre*, it was held that the plt. was right in thus traversing such parts of the plea as justified for places intended in the declaration, and in new assigning as to such part as had mistaken the place intended: *Prettyman v. Lawrence*, Cro. El. 812.

FORM AND NATURE OF.] A new assignment is said to be in the nature of a new declaration: 1 Saund. 299, c. It seems, however, to be more properly considered as a repetition of the declaration, differing only in this, that it distinguishes the true ground of complaint as being different from that which is covered by the plea; and it is consequently to be formed with as much certainty or specification of circumstances as the declaration itself; and, in some cases, greater certainty and particularity is requisite: Steph. P. 245. The commencement is the same as that of a replication, and the conclusion is with a verification and prayer of judgment. Where the plt. answers the plea, and also new assigns, it is usual to aver, in the new assignment, that the action was brought as well for the trespass mentioned in the plea, as for the trespass which is newly assigned. But, where the plea does not at all meet the place in the declaration, but justifies the trespass in some other place of the same name, or otherwise, upon some legal ground of defence, the plt. makes merely a new assignment, without traversing any part of the plea, for that would obviously be repugnant: in which new assignment, the place must be described with all its abutments by metes and boundaries, so as clearly to distinguish it from the place justified in the plea, Br. Ab. *Trespass*, 203, Dy. 264, Cro. Jac. 594, Cro. El. 355, 492; and, if the plea do not name the place, the assignment should: Arch. P. & E. 262. The matter new assigned must be consistent with the declaration, and not varying from, or more extensive than the trespass therein enumerated; if the declaration be *quare clausum fregit*, a new assignment, in a barn, would be bad; 4 Leon. 16. It should also be of a material matter: and, therefore if the plea set up a right of way or common, and at all times of the year, the new assignment should not be, that the deft. "at other times," time, in that case, being immaterial: 1 Chit. Pl. 551.

A new assignment being in the nature of a new declaration, the deft. should plead to it precisely as to a declaration, either by denying the matter new assigned, by the plea of not guilty, Br. Ab. *Trespass*, [\*685] pl. 369; \*or by arming it by a special plea of matter of justification, *ib.* 168, 203; and he may plead several pleas: *ib.*; 1 Chit. Pl. 553.

### Precedents.

#### NEW ASSIGNMENT IN TRESPASS FOR AN ASSAULT.

And, as to the said plea of the said deft., by him, secondly, above pleaded, as to the several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, the said plt. says, that, by reason of any thing in that plea alleged, he ought not to be barred from having and maintaining his aforesaid action thereof, against

the said deft., because he says that he brought his said action, not for the trespasses in the said second plea acknowledged to have been done, but for that the said deft., heretofore, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_, with force and arms, at \_\_\_\_\_, aforesaid, in the county aforesaid, upon another and different occasion, and for another and different purpose, than in the said second plea mentioned, made another and different assault upon the said plt. than the assault in the said second plea mentioned, and then and there beat, wounded, and ill-treated him in manner and form as the said plt. hath above thereof complained; which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said second plea acknowledged to have been done, and this the said plt. is ready to verify. Wherefore, inasmuch as the said deft. hath not answered the said trespass above newly assigned, he, the said plt. prays judgment and his damages by him sustained, by reason of the committing thereof, to be adjudged to him.

See various forms of new assignments, and subsequent pleadings thereto in 3 Chit. Pl., *Index*, "New Assignment."

NIL DEBET, *ante*, 409.—NIL HABUIT IN TENEMENTIS, *ante*, 623-627.—NON ASSUMPSIT, *ante*, 140.—NON CEPIT, *post*, "*Replevin*."—NON COMPOS, *ante*, 650.—NON DAMNIFICATUS, *ante*, 546.—NON EST FACTUM, *ante*, 393-4.—NON EST INVENTUS, *ante*, 523; *post*, "*Writ*."—NON-JOINDER, *ante*, 13.—NOT GUILTY, *ante*, 345; *post*, "*Trespass*," "*Trover*."—NOTARY, *post*, "*Protest*."—NOTICE, *post*, "*Secondary Evidence*."—NOTICE TO QUIT, *ante*, 465.—NOTICE OF ACTION, *ante*, 615; *post*, "*Officer*."—NOTICE TO DISPUTE COMMISSION, *ante*, 207.

[NONSUIT.

If the judge trying the cause direct a nonsuit at the trial, the counsel of the parties are not bound to insist on the cause going to the jury: *Law v. Wilkins*, 1 Nev. & P. 697.]

NUISANCE, ACTION FOR.

**FORM OF REMEDY.]** Where an injury is committed to a man's dwelling-house or real property, or to some right or privilege incident thereto, by the act of another, and without force, he may have an action on the case against the party who created or who continued the nuisance, and recover damages for the injury sustained. Thus, if a man build a house upon his own land, overhanging the house of his neighbour, whereby the rain falls upon it, 5 Co. 101, 2 Rol. 140, 150, 2 Leon. 93; or, if he fix a spout to his own house, whence the rain falls into the yard of his neighbour, and injures the foundation of his buildings, Fort, 212; or, if he erect a tallow-furnace, or any other offensive thing, so near his neighbour's house as to deprive or lessen his use or enjoyment of it, Com. D., *Case for Nuisance, A.*; or for the erection of a dwelling-house, the smoke and vapour of which are injurious to his property, 1 Rol. 89, L. 15; or for the stopping of a water-course, &c.: 2 *ib.* 140; L. 30. Case, and not trespass, is the proper remedy for continuing a nuisance, as for continuing holdfasts in the plt.'s wall after he had recovered in trespass for the original driv-

ing: 1 Stark. 22. Or for continuing a nuisance to the injury of a reversionary interest, after a recovery by the reversioner in a former action on the case for creating the nuisance by which his reversionary interest was injured, *Shadwell v. Hutchinson*, C. & P. 333. And it lies for [\*686] any other \*nuisance to houses or lands in possession, or to a decay: 11 East, 571. A nuisance may also be committed to incorporeal property, as to ways, franchises, &c., for which the remedy is also by action on the case. As, if a person have a right of way over another's land, and the tenant of the land plough up the way, 2 Rol. 140, L. 7; or if a person erect a fair or market so near another's, and hold it on the same day, whereby the other is deprived of the profit and advantage of his franchise: 2 Rol. 149. L. 10. So case lies for a nuisance to plt. on his personal property.

The action on the case merely gives damages, but does not remove the nuisance. It may have the effect, however, of compelling the deft. to abate the nuisance, as the injured party may bring successive actions for it as long as the deft. continues it, and recover damages against him for the continuance, as well as for the original erection of it. Where the tenant in possession has a freehold interest, he may have an assize of nuisance, or a writ of *quod permittat posternare*, by which the defendant may be compelled to abate the nuisance, these remedies, however, are obsolete, and never resorted to at present. So a tenant even for years, may justify entering upon the premises where the nuisance is erected, and abating it, provided, in doing so, he commit no breach of the peace, and cause no unnecessary damages: Esp. Ev. 486.

With respect to the *parties to the action*, see, in general, *ante*, "Case." Any party in possession, whether lawfully or not, if affected by the nuisance, may sue: 1 East, 244; 1 Show. 7; Cro. Car. 325. A landlord or reversioner, if the nuisance be to the damage of the inheritance, may sue: Com. D. *Action on Case for Nuisance, B.*; Arch. P. 14. Case lies by a reversioner for an injury affecting his reversionary interest in incorporeal property, as a way, &c.: 4 Burr. 2141. Both the occupier and reversioner may sue: 3 Lev. 209; Saund. 322, n. Tenants in common may join in personal actions as for nuisance to their land, because in such action, though their estates are several, yet the damages survive to all; and it would be unreasonable, when the damage is thus entire, to bring several actions for a single trespass: Bac. Ab. *Joint-Tenant, K.*; 2 W. Bl. R. 1007; 5 T. R. 247. A devisee may support an action for the continuance of a nuisance erected in the life time of the testator, for every continuance of a nuisance makes it a fresh one: Cro. Jac. 231.

In actions for nuisances in respect of real property, whether by misfeasance or malfeasance, as for obstructing ancient windows, or for nonfeasance, as for not taking care of premises, so as to prevent the consequences of a public nuisance, as for leaving open an area door or coal-plate, 3 Camp. 389, 403, or for not repairing fences, 4 T. R. 318, private ways, 3 ib. 766, or water-courses, 6 Taunt. 44, the action should generally, be brought against him who did the act complained of, or against the occupier, 4 T. R. 318, or against the occupier and not against the owner, if the premises were in the possession of the tenant, unless he covenanted to repair: 1 H. Bl. 350. Where the owner, however, erects a nuisance, and demises the land, an action may be supported against him, though out of possession, for the continuing it, as, by the demise, he affirms such con-



tinuance: 1 Salk. 480. [But a landlord is not liable in respect of a new nuisance erected by his tenant during the term: *Rea v. Pedley*, 3 Nev. & M. 627. Where a landlord lets premises, the natural consequence of the regular use of which is, that they will become a nuisance unless properly attended to, he is liable if they afterwards become a nuisance by such regular use. *Id. ib.*] It may be brought against an agent: 6 Moo. 47. Though, in torts, the assignee of an estate is not liable for an injury committed before he came to the estate, yet, if he continue a nuisance he will be liable for such continuance: Com. D. *Action, Case, Nuisance, B.*; 1 B. & P. 409. And every occupier is liable for the continuance of the nuisance on his land, &c., though evicted by another, if he refuse to remove it after notice: 1 Com. D. *Action, Case, Nuisance, B.*; Willes, 583; 2 Salk. 460; 2 B. & P. 409. Where there are several owners or persons chargeable as joint-tenants, or tenants in common, in respect of their real property, though the action be in form *ex dilecto*, they all should be made \*defts., or the party who is sued alone may [\*687] plead in abatement: 1 Saund. 291.

FORM OF PLEADINGS.] The venue is local: 1 Taunt. 379; 2 East, 7; 6 Taunt. 29.

It is not necessary to set out the plt.'s title to the premises; it is sufficient to state that the plt., at the time the injury was committed, was "possessed" of the house or land, &c., and that, "by reason of such possession," he was entitled to the way, or other right, in the exercise of which the nuisance was committed: Com. D. *Pleader*, C. 39; 2 Saund. 113, a.; 1 Chit. Pl. 330; *Peter v. Kendal*, 6 B. & C. 703. In a plea, this is otherwise: *ib.*; 3 T. R. 766. In the case in 6 B. & C. 703, it was held sufficient, in an action for disturbance of a ferry, to allege only possession of the ferry, and that it was not necessary to allege the payment of any specified sum for passage-money. If the right be not appurtenant to the house or land, &c., and the plt. be entitled thereto by agreement or license, the averment by reason of the possession would be improper: 4 East, 107; 6 East, 438. When a reversioner sues, it is sufficient to allege, generally, that the property was in possession of a third person, as his tenant. An allegation, in such action, of the possession of tenant, or plt.'s title still continuing, is immaterial, and need not be proved: 3 Taunt. 137. If a title be stated, and it appears to be insufficient, the declaration will be demurrable, 2 Ld. Raym. 1228, Salk. 365; it must be proved as stated: 2 Saund. 206, a. n. 22, 207, a. n. 24. In an action for disturbing ancient lights, or a mill, &c., it is unnecessary to state they were ancient: Cro. Car. 325; *ante*, 80; 1 Show. 17; 1 Leon. 247; Pea. Rep. 290. In declaring for not grinding at plt.'s mill, it is sufficient to do so generally upon the custom for certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll: 6 M. & S. 69.

With respect to the statement of the deft.'s duty, where the deft. is liable of common right, as to repair a wall for preventing damage to his neighbour, it is sufficient to state that deft. was possessed of a certain close, and that by reason thereof, he was bound to repair, &c., without showing the particular ground of the deft.'s liability: 6 Mod. 311; 2 Ld. Raym. 1090; 1 Chit. Pl. 332. Thus, where an action was brought for the deft.'s not repairing a private road leading through his close, it was held sufficient to allege, in a declaration, that the deft., as occupier of the close, ought to have

repaired it; though, when deft. prescribes in a plea, in right of his own estate, it is different: 2 Saund. 113, n. 1, 172, a. n. 1. [In case for a nuisance, occasioned by drains on premises belonging to the defendant, and adjoining the premises of the plaintiff, the declaration alleged that the defendant was the owner and proprietor of the drains, and that he ought to have kept them cleansed, and have prevented the accumulation of filth from running into the dwelling-house of the plaintiff, but neglected to do so, whereby, &c.: It was held, after pleading over, that the declaration was bad, as it did not show that the defendant was the occupier of the drains, and the nuisance was not shown to be of a permanent or continuing character: *Russell v. Shenton*, 2 Gale & Dav. 573. See 6 Barn. & Cres. 337; 4 T. R. 318; Cro. Jac. 555.]

With respect to the *statement of the injury itself*, the day stated in the declaration, as to when it was committed, is immaterial: Cro. El. 191; 2 Saund. 24, a. In a declaration for the continuance of a nuisance, it is unnecessary to show the time when the nuisance was erected: Cro. El. 191; 1 Ld. Raym. 370. It is not necessary to give any local description to the nuisance: 2 East, 497; 11 East, 226; 1 Taunt. 379. It is not necessary to show the termination of a water-course. Where the action is not brought against the original erector of the nuisance, but against his feoffee, lessee, &c., it is necessary to allege a special request, to the deft. to remove the nuisance: Willes, 583. In some cases, however, this is not necessary: R. & M. 189. In an action for the consequences of a public nuisance, it is not usual to state any undue intention on the part of the deft.: 2 Chit. Pl. 598. The injurious act should be described according to the fact. It will suffice to describe it generally, without setting out the particulars of the deft.'s acts, and the means of nuisance used by him: Willes, 677; 1 B. & P. 180; 3 Leon. 13; 1 Ld. Raym. 452. If, however, the plt. state the mode of injury, it must be proved as alleged: 3 Leon. 13; 1 Ld. Raym. 452; *infra*. But proving part of the injury as charged will suffice, to entitle the plt. to recover *pro tanto*: 2 East, 433; 2 W. Bl. R. [\*688] 790; 5 Taunt. 27; 4 \*M. & S. 349. The immediate, and not the remote cause of the injury, should be stated; and, under an averment of the remote cause, and an allegation that, by means of the premises, the noxious matter annoyed the plt.'s house, it is not competent to give evidence of the intermediate causes. Thus, where plt. alleged that the deft. wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away down a ditch, at the back of his house, and the evidence was that the heap was not originally placed so as to obstruct the water, but that, in process of time, earth from the heap was trodden down, and fell into the ditch and obstructed it, it was held a fatal variance: 5 Taunt. 534. If the plt. declare, as reversionary, for an injury done to his reversionary interest, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion: 1 M. & S. 234. The want of such an allegation will be a cause for arresting the judgment: *ib.*; and see instances there. A count for diverting and turning a stream of water will not be supported by proof of penning back and checking it, whereby the water was made to overflow the plt.'s meadow: 6 Price, 1. But, in case of negligently pulling down a wall adjoining a wall of plt.'s cellar, whereby the roof of the latter fell in, and a quantity of wine was destroyed, and it appeared that the proximate cause of

the damage was the placing a quantity of bricks, in taking down the wall, over the roof of the cellar, it was held no variance: 1 D. & R. C. 35; 3 Stark. 162; 1 D. & R. 497; 2 B. & C. 910; 6 Price, 1; 7 Moo. 345. Where, in an action on the case for diverting a stream of water from the plt.'s mill, the declaration alleged that the deft. placed and raised a certain dam across the stream, and thereby diverted and turned the water, and prevented it from running along its usual course to the plt.'s mill, and from supplying the same with water for the necessary working thereof, as the same of right ought, and otherwise would have done, it was held that such allegation was supported by proof, that in consequence of the dam the water was prevented from being regularly supplied to the plt.'s mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by the erection of the dam: *Icars v. Wood*, 7 Moo. 345.

*Plea.*] The general issue to an action for a nuisance is not guilty, under which every thing which shows that the deft. did what he lawfully might do, may be given in evidence: Selw. N. P. 1112. The statute of Limitations will be a sufficient defence to an action for a nuisance, and it begins to run from the arising of the consequential damages: *Gillon v. Boddington*, R. & M. 161; *Roberts v. Read*, 16 East, 215; *Howell v. Young*, 5 B. & C. 26; see, further, *post*, 689, 690. [The defence may also be pleaded specially. Plaintiff, possessed of a term of years in a dwelling house, complained of a noisy nuisance created by the defendants near his house: *Plea*, that the defendants had been possessed of certain work-shops, in which the noise was made, ten years before the plaintiff became possessed of the term in his house, and that during that time they had always made the noise in question, which was necessary for carrying on their trade: Held bad. *Elliotson v. Feetham*, 2 Bing. N. C. 134. The court intimated that the defendants should at least have alleged a holding of twenty years duration; but offered them the privilege of amending, provided they would produce an affidavit that they had a right to plead.]

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*Precedents.*

See form of declaration for nuisance for obstructing ancient lights, *ante*, 80; for disturbance of common, *ante*, 367; for disturbance of way, *post*, Way; and see the various forms in 3 Chit. Pl., *Index*, "Nuisance."

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*Evidence for Plaintiff.*

The plt. must establish his title to the right affected, the injurious act complained of, that deft. did the injury and the damages.

*Proof of Plaintiff's Title to Right.*] This title must be proved: 2 \*Saund. 114, c.; 4 Mod. 421; 1 Saund. 346. If the [\*689] action be for an injury to real property corporeal, at the suit of a party in possession he need only prove his possession, which may be done by his family, or others who can speak to such possession as stated in the declaration, at the time the injury was done. If his title be stated spe-

cially, it must be proved accordingly: *ante*, 687; 2 Saund. 206, *a. n.* 22, 207, *a. n.* 24. Where the action is at the suit of a reversioner, his title to the reversion must be proved: see *ante*, "Ejectment." In case for an injury done to the plt.'s reversionary interest in land, in cutting and carrying away trees, if he holds under a written agreement as tenant, it is incumbent on him to produce it: *Cotteril v. Hobby*, 4 B. & C. 465. If the property injured be *incorporeal*, plt. must prove his title to it by express proof, or by presumptive evidence thereof, by an enjoyment of twenty years, otherwise: *ante*, 82. As, where the deft. complains of an injury to an easement, it will be incumbent on him, (unless he can show an express grant) to carry his evidence of the condition of the land, and the enjoyment of the right, as far back as possible, in order to raise a presumption of right by grant or prescription: Selw. N. P. 1112. As to the evidence of a title in action for disturbing ancient windows, see *ante*, 82. In an action on the case for the disturbance of a ferry, it is sufficient for the plt. to prove that he was in possession of the ferry at the time when the cause of action arose, and it is not necessary for him to prove the payment of any specified sum for passage: *Peter v. Kendal*, 6 B. & C. 703. In an action against a stranger for disturbing the plt. in the possession of a pew, it is not necessary for the plt. to prove repairs, although it is otherwise where the action is against the ordinary: *Kenrick v. Taylor*, 1 Wils. 326. Where it was alleged that plt. was entitled to the use of a water-course by reason of his possession of a mill, it was held that the allegation was not supported by evidence of a parol license or agreement, by which the deft. permitted the exercise of the right in question to the plt., but did not legally grant or annex it to the mill: *Fentiman v. Smith*, 4 East, 107, and see, further, *ante*, 633, where a parol license is sufficient to give a right to an easement of real property.

*Proof of Injurious Act done.*] The nuisance should be proved as stated; and as to what a variance, see *ante*, 687. Plt. must prove an injury sufficient in law to constitute a nuisance to him, as by the erection of any thing offensive so near the house of another, as to render it useless and unfit for habitation as the erection of a pigstye, lime-kiln, privy, smith-forge, tobacco-mill, tallow-furnace, or the like: S. N. P. 1105; *ante*, 687, 83. In an action by a reversioner, he must prove the nuisance to be of such a permanent nature, as necessarily to affect his reversionary interest: see 1 M. & S. 234, 239. The reasonable exercise of a person's rights is not the subject of an action for a nuisance, though it may annoy another; as, where a butcher, or brewer, &c., exercises his trade in a convenient and appropriate place: Com. D. *Action on the Case of Nuisance, C.* Nor is the prevention of an excess in the exercise of such a right: *ib.* Such things as tend merely to abridge the gratification of plt.'s feelings, are not of themselves a nuisance; as, where the deft. kept his dogs so near the plt.'s house, that his family were prevented from sleeping during the night, and were also greatly disturbed at other times, and the jury found a verdict for the deft., the court refused a new trial, though he gave no evidence: *Street v. Tugwell*, S. N. P. 1047. As to injury to ancient lights, see *ante*, 83. For the purpose of proving the nuisance, plt. should call persons living in the house or neighbourhood, and who have had frequent means of perceiving the nuisances. Nuisances to the land, or to franchises, are also to be proved in like manner.

*Proof that Defendant committed the Nuisance.*] It must be established\* that the deft. himself, or his agent, committed [\*690] the nuisance: see *ante*, 82. It is not necessary that the nuisance be first occasioned by the deft.; he will be equally liable if he permit it to continue: though, where he is not the original promoter of the nuisance, a notice must have been served upon him, to remove it; the plt. may elect, however, to sue the party originally occasioning the nuisance, or his alienee: *Penruddock's case*, 5 Rep. 101, a. A notice to remove, delivered at the premises to which it relates, to the occupier, for the time being will bind a subsequent occupier, and a person who takes premises upon which a nuisance exists, and continues it, takes them subject to all the restrictions imposed upon his predecessors by the receipt of such a notice: *per Abbott, C. J., Salmon v. Bensley*, R. & M. 189. In an action for not repairing fences, the occupier is alone liable, and no action can be supported against the owner of the estate who is not in possession, *Cheetham v. Hampson*, 4 T. R. 318, except where the occupier can show that the owner was bound to repair: *Payne v. Rogers*, 2 H. Bl. 349. A party who merely directs the workmen in the erection of a nuisance may be joined as a deft. with the party originally occasioning it, *Wilson v. Peto*, 6 Moo. 47; and, where a landlord employed workmen in the repair of a house, he was held liable for a nuisance occasioned in making the repairs; though he was not in the occupation of the premises, and though the tenant was bound to repair: *Leslie v. Pounds*, 4 Taunt. 649. Persons acting within their jurisdiction, and in the exercise of a public duty, as commissioners of sewers, or road trustees, or persons acting under them as paviors, &c., are not liable for a nuisance, though, in fact a nuisance be committed: *Cast Plate Comp. v. Meredith*, 4 T. R. 794; *Harris v. Baker*, 4 M. & S. 27; *Sutton v. Clarke*, 6 Taunt. 41; *Boulton v. Crowthor*, 2 B. & C. 703; see *ante*, 73, 4. But, though they act within their jurisdiction, yet, if they act wantonly and oppressively, they are responsible for an injury committed, *ib.* 707, *Leader v. Moxon*, 3 Wils. 461; or where they do not act within their jurisdiction, or exceed their authority, 2 B. & C. 707, 4 T. R. 794, or where they act incautiously, unskillfully, or improvidently, they will be liable: *ib.*; *Jones v. Bird*, 5 B. & A. 837.

*Damages.*] These are usually proved by the party who proves the license. In difficult questions, surveyors, or persons of competent skill, should be called in. In an action by the reversioner, the tenant, if he will do so, should be present at the trial, and consent not to bring any action.

#### *Evidence for Defendant.*

This will consist in rebutting the plt.'s proofs, or showing a license, *ante*, "License," or other justification. See various titles of defence in the work: *ante*, "Case."

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NUL TIEL RECORD.—See Form of Plea, *ante*, 609; and Proof under, *ante*, 610; and, *post*, *Record*.

## OATH.

As to admissions by, *ante*, 41; how administered, *post*, “*Witness*.” See “*Affidavit*.”

[\*691]

## \*OFFICER, PUBLIC.—ACTION\*AGAINST.

*Form of Remedy and Pleadings.*

WHEN a public officer is sued for any act not done by him in the execution, or under colour of his office, the form of remedy and pleadings, in such suit, will be the same as against a common person; also, where a *ministerial* officer does a wrong act, as such, the plt. has, in general, the same form of remedy against him as against a common person; therefore trespass lies against such officer, if the act complained of was immediate and committed with force: 1 *Ld. Raym.* 471; 1 *Salk.* 395; 2 *T. R.* 225. The only exception to this rule is, where the plt. seeks to render the officer liable as a trespasser by relation, which cannot be done: and, in that case, case is the proper form of remedy, as in an action against a sheriff for levying a bankrupt's goods, after a secret act of bankruptcy: 1 *Burr.* 20; *T. R.* 480; 1 *Lev.* 173. Where an officer acts under the authority of a court having no jurisdiction, trespass or trover is the proper form of action, *Hard.* 483: or, where he acts under proceedings *coram non judice*: *Sir W. Jones*, 171, 1 *East*, 161. There is no remedy against him when the court has jurisdiction, but the proceedings is defective, since he is bound to obey the court. When an officer misapplies the process of the court, trespass may be supported against him: 2 *Wils.* 309; 2 *W. Bl. R.* 833; 6 *T. R.* 234; 8 *East*, 328. So, where he abuse it, 2 *T. R.* 148, 2 *B. & A.* 473, 1 *Chit. Pl.* 170, by an abuse of his authority, he becomes a trespasser *ab initio*: *Bac. Ab. Trespass, B.* For a mere nonfeasance, case is the proper form of remedy, 3 *B. & P.* 537, 1 *Leon*, 323, *Cro. El.* 196; but trespass sometimes would lie: *Com. D. Action, F.* 1; 1 *Wils.* 153. For an act done by an officer without a warrant, trespass or trover is the only form of remedy: 6 *T. R.* 316, *Doug.* 359.

*Declaration.*] There is nothing relating to the form of the declaration to distinguish it from actions against common persons. Where a notice of action is required, the declaration should conform, in substance, with the notice given: see 7 *T. R.* 631, *n.*; 1 *M. & Y.* 469.

*Venue.*] The venue in all actions upon the case or trespass against constables, church-wardens, &c., bailiffs of cities or towns corporate, head-boroughs, portreeves, tithingmen, or other persons acting in their aid and assistance, or by their command, for any thing done in their official capacity, must be laid in the country where the facts were committed, or the plt. will be nonsuited: 21 *Jac.* 1, c. 12, s. 5. An officer, acting under colour of his office, is entitled to the benefit of this provision: *Staight v. Gee*, 2 *Stark.* 445; 3 *B. & A.* 330. The statute extends to all who act in

aid or under the command of the officer, but not a prime mover and principal: *ib.* Holt, C. N. P. 478. By 42 G. 3, c. 85, the provisions of the 21 Jac. 1, c. 12, with regard to venue, &c., are extended to all persons being employed in any public employment, &c. and who have, by virtue of such employment, power or authority to commit persons to safe custody. The excise and custom-house acts contain similar provisions as to the locality of the venue, as also do the highway, turnpike, and militia acts.

*Plea.*] In an action against a peace-officer, constable, or churchwarden, or other acting in their assistance, or by their command, for any thing done by them by virtue or reason of their office, the general issue \*may be pleaded, and the special matter given in [\*692] evidence: 21 Jac. 1, c. 12, s. 5. And there is a similar provision in the highway, 13 G. 3, c. 78, militia, land, and assessed tax acts, and other acts. Where a party assists the officer acting under process or warrant, he may defend under the general issue, 3 Camp. 257; but he could not do so if he were prime mover: Holt. C. N. P. 478; 2 Stark. 445. It is in general, however, best for the officer or other deft. to plead specially in order to narrow the evidence at the trial, and especially if he acted under process. The officer had better not join in the plea with the common person sued with him, to avoid costs, &c., in the event of the other deft. not succeeding: see 2 Bing. 523; 2 Str. 1184; see *ante*, 515-6, as to justifications of imprisonment.

### *Evidence for Plaintiff.*

The plt. must establish his cause of action, and support the issue joined, as in other causes. We have already partly considered how far public agents and officers are liable for their acts, *ante*, 690; and, as to the liability of vestrymen and overseers, &c., see *ante*, 73-4. Besides the cause of action, plt. will, in most cases, have to prove the commencement of the action within the limited time; a notice of action, and due service of it in proper time; that the act was committed in the county where the venue is laid; and, in some cases, that a demand of copy and perusal of the warrant under which deft. acted, has been made.

**PROOF OF COMMENCEMENT OF ACTIONS IN LIMITED TIME.** *Constables, &c.*] By 24 G. 2, c. 44, s. 8, "No action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough or other officer or person acting by his order, and in his aid, unless commenced within *six* calendar months after the act committed." Whenever a constable acts *virtute officii*, the action must be commenced within six months; but it is otherwise where he acts merely *colore officii*. Therefore, if, by acting within the limits of his authority, he exercises that authority improperly, the statute extends to him:—the distinction being between the extent and the abuse of his authority, *Alcock v. Andrews*, 2 Esp. Rep. 542; also 2 B. & B. 619, 5 Moo. R. 382, s. c. 3 B. & B. 239; and, even where the constable broke the outer door to levy a church-rate, under 53 G. 3, c. 127, it was held that no action could be brought against him after three months: 1 B. & A. 227. And, when a constable is acting *bona fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the very

time in obedience to the warrant of a magistrate, he is entitled to the protection of the 8th sect. of this statute; and, therefore, if he takes the goods of B., under a warrant against A., believing them to be his, he is entitled to notice: *Purton v. Williams*, 3 B. & A. 335. From the authority of the case of *Postlewaite v. Gibson*, 3 Esp. Rep. 226, it was considered, that, where the constable acts *without a warrant*, an action would lie after the six months. But *Abbott, C. J.*, however, observed, in the case of *Parton v. Williams, ib.*, "If it were necessary to determine whether a constable who, *without a warrant*, acting in the *execution of his office*, and in the discharge of his *ordinary duty* be entitled to the protection of this statute, I should wish for time to consider it; but, in *Postlewaite v. Gibson*, the constable was not acting in the execution of his ordinary duty, as he arrested a man for felony upon the *order of a private individual*;" see also the *dictum* of *Dallas, C. J.*, 3 B. & B. 622.

The action must be brought within six months of the day of committing the act, including that day; 4 Moo. 465. Where the imprisonment is continued under the warrant, it is sufficient to prove a notice within six months of any part of it; 12 East, 67. But the plt. ought to proceed within six months after his notice, if it is given within the imprisonment; [\*693] for, even if the trespass continue, there would be due notice as to the subsequent cause of action: 14 East, 491. "If a man be imprisoned by a justice's warrant on the first day of January, and kept in prison till the first day of February, he will be in time if he brings his action within six months after the first of February, for the whole imprisonment is one entire trespass:" *Pickersgill v. Palmer*, Tr. 1 G. 3, C. B., Salk. 420, cited in B. N. P. 24.

As to mode of proving commencement of action, see *ante*, 162.

*Officers of Excise, Customs, Taxes, &c.*] By 28 G. 3, c. 37, s. 23, "If an action, &c., shall be brought, &c., against any person for any thing done in pursuance of any act relating to the revenues of customs and excise, &c., such action shall be commenced within three months next after the matter or thing done." By 43 G. 3, c. 99, s. 70, actions against persons acting under that, or any other tax act, shall be commenced within six *calendar* months after the fact committed: *ante*, 692. There are also various other acts of a local nature, limiting the time for bringing action.

**PROOF OF NOTICE OF ACTION.** *Officers of the Excise and Customs.*] By the statute 28 G. 3, c. 37, s. 25, "No writ, &c., shall be sued out against *any officer of the customs or excise*, or persons acting under them, for any thing done in the execution of any act of parliament relating to the revenues, until one calendar month after notice in writing shall have been delivered to such person, or left at their usual place of abode, by the attorney or agent of the person suing: in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said attorney or agent," and that he shall have a fee of 20s. for serving notice, &c. As to the persons who are entitled to the benefit of this act, it has been held, that an extra man though not appointed by the



board of excise, is entitled to it, as one acting under an excise officer, if he be sent to search, though no regular officer be present: 2 Smith's Rep. 220. And an excise officer is entitled to notice, if acting *bona fide* in the supposed execution of his office, though he has done an act not warranted by his official capacity: 5 T. R. 1; Tidd. 29, (a.) (b.) As to West-India Dock and other acts, see Tidd, 8, *ib.* 29, &c.

A notice in the form of a declaration is good: 1 M. & Y. 469. A notice of action against a toll-keeper for demanding and taking toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, is too uncertain and bad: 2 Chit. Rep. 573. And see, further, as to the form of the notice, *ante*, 615. A separate notice to each of several persons intended to be sued in trespass has been deemed sufficient to found a joint action against all of them for things done in pursuance of an act of parliament, although none of the other persons who were afterwards joined in the action were named in the notice to either of them: 2 Price, 126; 5 *ib.* 168. But, where one person acted as clerk to two public bodies, and a notice of action required by statute was given, addressed to him as clerk to one body, the cause of action arising under the authority of the other body, it was held insufficient: 1 Taunt. 383. The month begins the day on which the notice is served, 3 T. R. 623; and the action must be brought within three months (lunar, 6 T. R. 227, 1 Bing. 307,) after the cause of it accrued, so that the notice must be served one calendar month, at least, before the expiration of three lunar months from the time of the cause of action. As to proof of service, &c., of notice, see *ante*, 614, *post*, "*Secondary Evidence*." As to proof of commencement of action, see *ante*, 162.

\**Tax Officers.*] By 43 G. 3, c. 99, s. 70, consolidating the tax [\*694] acts and commissions of taxes, are protected, and "No writ, &c. shall be sued out, &c., against any person or persons for any thing done in pursuance of that act, or any act, for granting duties to be assessed of that act, until one calendar month next after notice in writing shall have been delivered to, or left at the usual place of abode of such person or persons, by the attorney or agent for the intended plt. or plt.'s, in which notice shall be clearly and completely contained the cause and causes of action, the name and place or places of abode of the intended plt. &c.; and of his or their attorney or agent, and no evidence shall be given on the trial of such action or suit of any cause or causes of action, other than such as is or are contained in such notice." The notice required in this case extends only to officers empowered to levy taxes by virtue of the act, and, therefore, a sheriff who levies arrears of taxes under 48 G. 3, c. 141, No. 5, par. 2, is not entitled to notice of an action to be brought against him for any thing done under the provisions of that act: *Copland v. Powell*, 1 Bing. 369. It is not necessary to give a notice of action in this act, where assumpsit is intended to be brought for money had and received to recover the account of an excessive charge made by defts., as collectors, on a distress for arrears of taxes: 1 B. & A. 42. But a toll-collector is entitled to a notice of action for a recovery of more toll than he had a right to do: 4 B. & C. 200.

*Proof of DEMAND OF WARRANT.*] Where the action is brought against

a constable or peace-officer, a demand of a perusal, and copy of the justice's warrant, must be made on him, if he was acting under a warrant; as, by 24 G. 2, c. 44, s. 6, it is enacted, that "no action shall be brought against any constable, headborough, or other officer, or against any person acting by his order, and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace, until demand has been made, or left at the usual place of his abode, by the party or his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand." And, in case the constable, or, &c., comply with the demand, the justice of the peace must be made a co-deflt.; the constable or other officer, by producing and proving such warrant at the trial, shall have a verdict, notwithstanding any defect of jurisdiction in the justice of the peace: if such action be brought jointly, and the warrant be produced, the jury shall find for the constable; and, if the verdict be against the justice of the peace, the plt. shall recover all his costs from him." The object of the clause was, "to substitute the justice of the peace by whom the warrant was granted, and who was supposed to be cognizant of the legality of it, in lieu of the officer, who was merely the instrument to execute it, and who was probably ignorant of the grounds on which it was issued: *per Laurence, J.*, 5 East, 447. But, unless the officer act in obedience to the warrant, he is not protected by this clause of the statute; and, if the justice of the peace is not liable, the officer is not within its protection, 3 Bur. 1768, 1 W. Bla. 555. *s. c.*, B. N. P. 24, *a.*, 2 M. & S. 260, 3 Esp. Rep. 226, 5 East, 233; but, if he act in obedience to the warrant, he is protected, though the justice of the peace have no jurisdiction, or the warrant be illegal, or an absolute nullity, 2 B. & P. 162, 2 Wils. 291; unless, indeed, it were *manifestly and flagrantly* so: 2 Stark, 815, *n. a.*; see also, McCl. & Y. Rep. 107: also, 2 M. & S. 259. It has been held, that a constable, who imprisons a person on suspicion of felony, without any reasonable grounds, of his own authority, without any warrant or charge from any other person, is within the statute: and that, if a private person act in such case in aid of the constable, and upon his command, he also is within the [\*695] statute; but, if he is a prime mover, and act as principal in the transaction, he is not; and it has been held that the words, by virtue of his office, meant to insure him the benefit of this statute, in all cases where he was acting under colour of his office, and intending to act in the character of a constable: *Straight v. Gee*, 2 Stark. 445. A constable who acts without a warrant, and not in obedience, but in the regular and ordinary discharge of his duty, is within the 8th section of this statute: 1 B. & A. 227; 3 B. & A. 380. But where a constable, the keeper of a prison, receives and detains one apprehended and charged in his custody under a warrant, he is liable, if the officer to whom the warrant was directed has executed against a wrong person, though the prison-keeper have no means of ascertaining the identity of the individual named therein: 3 Camp. 35.

Churchwardens and overseers of the poor, acting under a warrant of distress for a poor's rate, are within the description of officers who are protected in actions under this clause of the statute: *Harper v. Carr*, 7 T. R. 271.

The demand of perusal, and copy of the warrant, must be made in

writing, either on the person, or by leaving the demand at his usual place of abode, by himself or his attorney: *supra*. As it may be material to ascertain the precise day on which the demand of warrant was made, a note should be made on the duplicate as to the day it was served; and the writ should be produced in court, to show that the action was not sued out till after the six days. If the demand is made in time, and the constable neglect to comply with it till after the expiration of the six days, he may still comply, by delivering a copy, &c., at any time before action brought, but not after: *Jones v. Vaughan*, 5 East, 447. When the plt. has received a copy of the warrant, he must ascertain whether the constable is, by the warrant, entitled to the protection of the 8th section of the above act, as, if he is not, the action should have been against the justice of the peace: *ante*, 694.

*Evidence for Defendant.*

This must necessarily vary, from the nature of the defence intended to be set up. He must be prepared to substantiate it fully. As to proof of his being a public officer, see *ante*, 357. As to proof of judgment, writ, or warrant, see those titles.

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OFFICE COPY, see "*Record*."—OPINION OF WITNESSES, see "*Witness*."—OPPRESSION, *ante*, "*Duress*."—ORDER, see "*Decree*," "*Rule of Court*."—OUSTER, *ante*, 451-6.—OUTLAWRY, *ante*, 2.—OVERSEERS, *ante*, "*Officers*," and *ante* 73-4.—PARISH BOOKS, *post*, "*Public Document*."—PARISHIONER, *ante*, 371, *post*, "*Witness*."

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[PARENT AND CHILD.]

Where a father was induced to give up to the plaintiff the custody of his legitimate child, (born after the elopement of its mother, and about to be placed by the defendant in a foundling hospital,) and he entirely relinquished all care of it; held by the Court of King's Bench to negative an implied contract with the plaintiff to pay for the maintenance of the child: *Urmston v. Newcomen*, 6 Nev. & M. 454, S. C. 4 Ad. & Ell. 899. And it seems that a parent is not bound to maintain an illegitimate child, not being part of his family. *Ibid.*]

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PARLIAMENT, JOURNALS OF.

ENTRIES in the Journals of the Lords or Commons are evidence of their proceedings. Thus, an entry in the journals of the House of Lords, stating the reversal of a judgment below, is evidence of the fact of reversal: *Jones v. Randall*, Cowp. 17. And an address from the House of Lords to the King, and the King's answer thereto, have been proved by an entry in their journals; and it was also held to be evidence of an averment in an information, that certain differences had arisen between the kings of

England and Spain, the matter to be proved being merely [\*696] \*one of state: *Franklin's case*, St. Tri. 259; *Rex v. Holt*, 5 T.

R. 446. But the resolutions of either house, with a view to ulterior proceedings, though entered in the journals of Parliament, will not be evidence of the truth of all facts therein stated: as, where a party was charged with having committed perjury on the trial of persons concerned in the Popish plot, the existence of such plot could not be proved by its having been asserted in the resolutions: 4 St. Tri. 39.

Entries in the journals of either houses are to be proved by examined copies; the printed journals alone are not, however, evidence: *Ld. Melville's case*, How. St. Tri. 683.

### PAROL EVIDENCE.

*When of a Secondary Nature*, 696.—*When Inadmissible to contradict Writings*, *ib.*—*When Admissible to vary the Date, &c.*, 697.—*To prove Fraud*, *ib.*—*To prove Usages and Customs*, *ib.*—*To discharge a Contract*, *ib.*—*To explain a latent Ambiguity*, 698.—*To prove Collateral Matters*, *ib.*

*When Secondary.*] Written evidence is considered of a higher nature than parol testimony, being more accurate than the memory of witnesses, and more certain than their veracity or interpretation. If, therefore, a contract has been reduced to writing, that writing must be produced, as the best evidence to prove it: *Bremer v. Palmer*, 3 Esp. Rep. 213. If, when produced, it be inadmissible for want of a stamp, parol testimony cannot be received. But a mere memorandum, not signed by the parties, will not prevent the reception of parol evidence: *Doe v. Cartwright*, 3 B. & A. 326; and see *Hawkins v. Ware*, 3 B. & C. 698; 5 D. & R. 512. So, where a verbal contract is made for the sale of goods, and it is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, it may be proved by parol: *Dalison v. Stark*, 4 Esp. Rep. 163. To render the production of the writing necessary, it must appear to relate to the question: thus, where the parol evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it was made between the parties in the relation of landlord and tenant, and is still subsisting in force: *Doe v. Morris*, 12 East, 237.

*Inadmissible to contradict Writings.*] If the terms of a written instrument are not ambiguous, no other evidence of the intention of the parties will be admitted, and consequently parol evidence will be refused, though tending to show the real meaning of the parties, 3 Camp. 426, or the usage of trade, 6 T. R. 320, 2 Marsh. 141, or custom of the country, 2 B. & A. 746, contrary to the terms of the written agreement: 3 Camp. 57; 1 Moo. 535; 1 Taunt. 347; 8 *ib.* 92. Thus, if a note be made payable on a certain day, parol evidence is not admissible to prove it payable upon a contingency: *Dawson v. Walker*, 1 Stark, 361. So, where the condition of a sale described the trees by number and kind, saying nothing of the weight, parol evidence that the auctioneer had warranted the tim-

ber of a certain weight was rejected: *Powell v. Edmunds*, 12 East, 6. The legal construction of instruments may not be altered by parol testimony; as where an agreement for the sale of goods says nothing as to time of delivery, by the legal construction, the delivery must be in a reasonable time, and parol evidence that they were to be taken away immediately is inadmissible: *Greaves v. Ashlin*, 3 Camp. 426. Nor is it \*admissible to show that the parties intended to use a word, [\*697] to which by statute a particular and well-known meaning is attached, in another and different sense, there being no language in the instrument to support such interpretation, as the word "Michaelmas Day" in a lease, or "bushel" (which means Winchester measure) in a contract: 11 East, 312; 1 D. & R. 507; 4 T. R. 314; *ib.* 338; 4 Taunt. 102. Nor to connect together two instruments which have no immediate or necessary reference to each other: 11 East, 142; 1 Bing. 9, 196; 1 Ves. Jun. 326. Defects and blanks in the writing cannot be supplied by parol evidence: 2 Stark. Ev. 998; 3 Bing. 112.

*When admissible to vary the Debt, &c.*] Parol evidence is admitted to prove a deed delivered on a different day from that on which it professes to have been indented and concluded: 3 Dev. 348; *Steele v. Mart*, 4 B. & C. 272; 6 D. & R. 329. To prove a consideration, if averred, where none is mentioned in the deed: *Mildmay's case*, 1 Rep. 176, *a.*; *Peacock v. Monk*, 1 Ves. 128. To prove an additional consideration, not contrary to the deed, *ib.*, *Wilkes v. Beaumont*, Dyer, 146, *a.*; as, in a settlement case, where the deed stated the consideration of the purchase to be £28, to prove it in fact £30: *Rex v. Scummonden*, 3 T. R. 474.

*Admissible to prove Fraud.*] Where fraud is imputed, any consideration, however contrary to the instrument, may be proved: B. N. P. 173. In order to set aside a will for fraud, what passed at the signing, and what the testator said, may be proved by parol: *Doe v. Allen*, 8 T. R. 147. The party charged with fraud may not prove any other consideration than that stated: *Clarkson v. Hanway*, 3 P. Wms. 203.

*Admissible to prove Usages and Customs.*] A custom affecting a contract has been proved by parol testimony, in order to aid the construction of the instrument, on the ground that the parties contracted subject to the operation of the custom; as, if a ship be warranted to depart with convoy, the usage of merchants is admitted to show that this meant convoy from the usual place of rendezvous: *Lathullier's case*, 2 Salk. 443. It has been doubted whether the admission of parol evidence in these cases has not been carried to an inconvenient length: *Anderson v. Pitcher*, 2 B. & P. 168. Customary rights, as of a heriot, though not expressed in the lease, may be shown by parol, *White v. Sayer*, Palm. 211; or that the lessee is entitled to an away-going crop, though not mentioned in the instrument, *Wigglesworth v. Dallison*, Doug. 201, *Senior v. Armitage*, Holt, 197; but neither is proof of the usage of merchants to contradict the plain words of the policy, *Parkinson v. Collier*, Park. Ins. 416; nor is a customary right to be proved, if excluded by the express terms or necessary implication of the covenant; *Webb v. Plummer*, 2 B. & A. 746. In the construction of ancient deeds, and charters, the continued and immemorial usage under them may be shown by parol testimony: 2 Inst. 282; *Rex*

*v. Vaile*, Cowp. 248; *Chad v. Lilsed*, 2 B. & A. 406; 3 Atk. 576; *Withnel v. Gartham*, 6 T. R. 398; *Stammers v. Dixon*, 7 East, 200. And, though the words therein be general, they are to be construed according to the manner in which the thing has been always possessed and used, *Wild v. Hornby*, 7 East, 199; but evidence of usage will not be received to overturn the clear words of a charter: *Rex v. Varlo*, Cowp. 248. And, in the construction of modern deeds, evidence of the acts of the parties is not admitted to show their understanding of the instrument: *Clifton v. Walmesley*, 5 T. R. 564; 9 Ves. 333; 2 N. R. 452; 6 Ves. 238.

*Admissible to discharge a written Contract.*] An executory agreement\* in writing, not under seal, may, before breach, be discharged by subsequent parol agreement, *Ld. Milton v. Ednorth*, 6 B. & C. 587; but, after breach, it cannot, unless by deed, or accord and satisfaction: B. N. P. 152. So, it seems that, where a writing is necessary by the Statute of Frauds, yet the contract may be discharged by parol before breach; 1 Ph. Ev. 545; *Cuff v. Penn.* 1 M. & S. 21.

*Admissible to explain latent Ambiguity.*] An ambiguity apparent on the face of the instrument, is termed *ambiguitas patens*, and no parol evidence is admitted to explain it; but an *ambiguitas latens*, which arises upon the application of the instrument, is raised by the introduction of parol evidence, and may be explained by evidence of the same description. Thus, upon a demise of the manor of A., if it appear that the party had two manors of that name, 3 Wils. Rep. 276, or upon a bequest to my cousin, T. S., if I have two cousins of that name, 1 W. Bl. R. 50, evidence may be adduced to show which of the two the testator intended, 4 Dow, 93; and whether parcel or not of the thing demised, is always a subject of parol evidence; 1 T. R. 701; 2 Stark. 508; 1 B. & A. 247. If a blank be left for the Christian name only, *Price v. Page*, 4 Ves. 680, or if a person be described by the Christian and surname only, and no person of that name claims, *Beaumont v. Fell*, 1 P. Wms. 141, 1 Meriv. 384, parol testimony of the intention is admissible, to supply the omission, and correct the mistake. So, where a fine was levied of twelve messuages in Chelsea, and it appeared that the cognizor had more than twelve messuages in Chelsea, parol evidence was admitted to show which messuages in particular the cognizor intended to pass, *Doe v. Wilford*, 1 R. & M. 88; but, where a subject exists, which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity; as, where the testator devised "his estate at Ashton," parol evidence was not admitted to show that he was accustomed to call all his maternal estate his "Ashton estate," there being an estate in the parish of Ashton, which was sufficient to satisfy the devise: *Doe v. Oxendon*, 3 Taunt. 147; 4 Dow, 65. The latent ambiguity is always created by extrinsic facts; and, therefore, parol evidence is inadmissible upon a demise "to one of the sons of J. S.," 2 P. Wms. 137, 2 Vent. 624, 625, 6 Co. 68, b.; or, where a blank is left for the devisee's name, *Baylis v. Att. Gen.*, 2 Atk. 329, to show who was intended. Yet, where a devise was to Mrs. C., the chancellor referred it to the master to receive evidence who was intended: *Abbot v. Massie*, 3 Ves. 148. It seems to be the opinion of Mr. Phillips, that parol testimony would be received to supply a blank of the quantity of goods to be delivered; in an agreement not within the

Statute of Frauds: 1 Ph. Ev. 591. And where, in a bishop's register, a blank was left for the patron's name, it was held that this might be supplied by parol evidence: *Ep. of Meath v. Ld. Belfield*, 1 Wils. 215. In cases of latent ambiguity, the actions of the parties previous to, and contemporaneous with, but not subsequent to the agreement, are admissible to explain it, by directing its application: as, if a bargain be made for wheat, without stating the quality, evidence of former dealings for a particular quality would perhaps be received: 1 Powell, 372, 384; 2 *ib.* 41; 3 Chit. Com. L. 113. Where there is no latent ambiguity, even prior letters of the parties cannot be received to alter the sense of the agreement: 4 B. & C. 187; 6 D. & R. 329.

*Admissible to prove Collateral Matters.]* There are some cases where parol evidence seems admissible to prove collateral or additional stipulations; as, if the additional terms constitute in part a new assignment, incorporating the former written terms, or continuing the former contract: 3 Stark. Ev. 1007; 1 M. & S. 21. It has been held that parol evidence is admissible to show that a legacy was not intended in satisfaction of a debt: see 3 P. Wms. 353; 2 Vent. 593. [\*699] Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract; but if the contract be in the end reduced to writing, nothing which is not found in the writing can be considered part of the contract. A matter antecedent to, and *dehors* the writing, may, in some cases, be received in evidence, as showing the inducement to the contract, as a representation of the quality of the thing sold. But the buyer is not at liberty to show such a representation, unless he can show that the seller, by fraud, prevented his discovering a fault which the seller knew: 2 B. & C. 634; 3 *ib.* 623; 4 D. & R. 60. Parol evidence has been received to prove that a written contract between A. and B. was, in fact, made by B. as agent, *Wilson v. Hart*, 7 Taunt. 295, to prove that, where the time for delivering the goods were fixed by the writing, a verbal agreement, after part had been delivered, altered the time for delivering the remainder: *Cuff v. Penn*, 1 M. & S. 21.

## PARTICULARS OF DEMAND AND SET-OFF.

*EFFECT OF.]* A bill of particulars of demand or set-off, under a Judge's order, precludes the party who delivers it from giving evidence of any other demand not then stated. Thus, on counts for money had and received, and for houses sold by the plt. to the deft. when the bill of particulars contained only the latter demand, evidence was not admitted of the money due from the deft. for houses sold by him as the plt.'s agent: *Holland v. Hopkins*, 2 B. & P. 243. Where the particulars contained only a demand for a promissory note, which, for want of a stamp, could not be given in evidence, evidence of its consideration was held not within the particulars: *Wade v. Beasley*, 4 Esp. Rep. 7. In assumpsit, the deft. pleaded, in abatement, that the promises were made jointly with another, and it appeared, by the bill of particulars, that such was the fact with regard to some of the demands, though others were due from the deft. alone;

and *Ld. Kenyon* held the plt. bound by his particular, and directed a non-suit, which the court refused to set aside: *Colson v. Lelly*, 1 Esp. Rep. 451; 1 Ph. Ev. 181, *n.* When, in the particulars of a set-off, the deft. stated the subject matter to be the sum of £34, "the amount of dividends upon a debt of S. P. to the deft., which said dividends are directed to be paid, as in the said notice of set-off particularly mentioned;" and the notice of set-off was for dividends under a composition deed of assignment by a former debtor of the deft., guaranteed by the plt., and also for money had and received, and an account stated, it was held that the particulars confined the deft. to his demand on the guarantee: *Andrews v. Beard*, 8 Price, 213.

On the other hand, if the particulars are sufficient information of the demand or set-off, to guard the opposite party against surprise, inaccuracies, not calculated to mislead, will not be material. Thus, where in assumption the bill of particulars stated an item of money advanced under the name of A. by mistake, instead of B., the plt. was allowed to prove that the item was intended, and must have been understood, to refer to the latter name, and the deft., to set aside that item must make affidavit that he had been misled: *Day v. Bowen*, 1 Camp. 69, *n.*; *Brown v. Hodgson*, 4 Taunt. 198. So, in debt for rent, if premises in A. be described as situate in B.: it is immaterial, unless the deft. show he held other premises of the plt. in B.: *Davis v. Edwards*, 3 M. & S. 380. So, in ejectment to recover premises forfeited by the non-payment of rent, a variance between the amount of rent proved to be due, and the amount demanded in the particulars, was held immaterial; 3 Bing. 3. So, [\*700] when the work for which the action was brought was stated in the particulars to have been done in a wrong month, the plt. gave evidence of work done in the other month: *Milwood v. Waller*, 2 Taunt. 224. And, where the particulars specified a bill, dated on a certain day, for £60, and the evidence was of a bill for £63, of a different day, but the same year and month, *Abbott, J.*, held the variance to be immaterial: *Manning's Index*, 240. Upon counts against an agent, for not accounting for goods sold, and money had and received, particulars headed "A. to B., tierces of porter, &c., £——," and containing also items for money had and received, were held applicable to any of the counts: *Hunter v. Walsh*, 1 Stark. 224. And where a carrier had misdelivered goods to the deft., which the deft. had appropriated to his own use, and the carrier had paid their value to the right owner, it was held that the carrier might recover on the count for money paid, although his particulars were only "to seventeen firkins of butter, £55. 6s.:" *Brown v. Hodgson*, 4 Taunt. 189. The plt. declared on three bills as distinct causes of action, in three several counts, but in his particulars confined his demand to the bill in the first count: the defence was, that the defts. were not partners when the bill was drawn; the plt. offered, in evidence, the two other bills of subsequent date, but drawn at the same time as the first, for the purpose of proving a continuing partnership, which were rejected on the ground that they were not included in the particulars, and the Court of Common Pleas granted a new trial: *Duncan v. Hill*, 5 Moo. 547; 2 B. & B. 682, *s. c.* The plt. may recover interest, though the particulars contain only a demand upon a promissory note: *Blake v. Lawrence*, 4 Esp. Rep. 147. And it has been ruled, that the plt. might recover more than his particular demand, when the deft. gave in evidence



an account, from which it appeared there was a sum of money due to the plt. not included in his particulars: *Hunt v. Watkins*, 1 Camp. 68: see 3 Taunt. 285; 2 B. & P. 243; 1 Ph. Ev. 182. The plt. may give evidence of a demand contained in his particulars, though omitted in a bill delivered before action brought: *Short v. Edwards*, 1 Esp. Rep. 374.

A second bill of particulars, not delivered under a Judge's order, will not cure a defect in a previous bill of particulars: *Brown v. Watts*, 1 Taunt. 353. On the other hand, if, either before or after the delivery of particulars under a Judge's order, the plt. makes a demand of only part of the articles specified, such demand will not confine his evidence, nor supersede his bill of particulars: *Short v. Edwards*, 1 Esp. Rep. 373.

**PROOF OF.]** The particulars of demand are proved by the production of the Judge's order, and by proof of delivery of the bill; and their delivery is sufficiently proved by proving the signature of the party's attorney, or of his agent, to the particulars: 1 Ph. Ev. 183. But if the deft., in order to prove part payment, produce the particulars of the plt.'s demand, in which credit was given for such payment, the particulars will be received in evidence, as of admissions, on proof of the hand-writing of the plt.'s attorney, without production of the Judge's order: *Rymer v. Cook*, Moody & M. N. P. C. 86.

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## \*PARTNERS.

[ 701 ]

### I. ACTIONS BY.

FORM OF REMEDY, AND PARTIES TO ACTION, 701.

FORM OF PLEADINGS, 703.

PRECEDENTS, 704.

EVIDENCE FOR PLAINTIFF, *ib.*

EVIDENCE FOR DEFENDANT, 705. .

COMPETENCY OF WITNESSES, 706.

**FORM OF REMEDY AND PARTIES TO ACTION.]** There is nothing particular relating to the form of remedy for a cause of action arising to partners.

**When Partners must all sue on a Contract.]** All parties, at the time of making a contract, 1 Esp. Rep. 180, must join in an action thereon: *Teed v. Ehworthy*, 14 East, 210; 7 T. R. 257. Joint-tenants, must, in all cases, join in an action *ex contractu*, or personal action: Co. Lit. 180, b.; Bac. Ab. *Joint-Tenants*, K. As to tenants in common, joining or severing, in action for rent, &c., 5 B. & A. 851; 1 Lev. 109. Partners, also, must join in all actions concerning their estate: Vin. Ab. *Partners*. Where a person is held out to the world as a partner, and others have thereby been induced to give credit to the firm, he must be joined: *Guidon v. Robson*, 2 Camp. 302. But a mere nominal partner, having no interest in the firm, need not be joined: *Glossop v. Colman and others*, 1 Stark. 25; 2 Camp. 302; 1 C. & P. 89. A minor partner, if he shares in the profits of the concern, must be joined, *Teed v. Ehworthy*, 14 East,

210, but, if he do not share in the profits, he may be omitted, though held out to the world as a partner: 1 Stark. 25. And a dormant partner may join; yet, if he be not privy to the contract, and his name does not appear to the world, he need not be joined as a plt. with other partners: *Lloyd v. Archbottle*, 2 Taunt. 324-5, *n. (a.)*; *Leveck and another v. Shaftoe*, 2 Esp. Rep. 468; 1 C. & P. 89; 3 Stark. 8; 4 B. & A. 437, *contra*; 1 Marsh. 246. Where one partner represents himself as acting on his own account, and the subject matter as his separate property, and the firm afterwards sue, they will be nonsuited: *Lucas v. De la Cour*, 1 M. & S. 249. But, where the owners of a *whale ship* sued a purchaser for the price of whale oil, though the contract of purchase was made with one of the part-owners, and the purchaser was ignorant of others having any interest in the transaction, it was held that the action might be maintained, either in the name of the person with whom the contract was made, or in the name of the parties really interested, as the joinder of the parties made no difference to deft., and did not affect any right of set-off; *Skinner v. Stocks*, 4 B. & A. 437; *Parsons v. Crosby*, 5 Esp. Rep. 199. Any private agreement between the partners, that only certain members shall sue, or receive payment of the claim, will make no difference: 3 M. & S. 488. There may be, however, in some cases, a change of credit by agreement between the parties, so as to transfer the liability from the original contracting party, to one only of the firm: 1 N. R. 124, 131; 4 Esp. Rep. 91; 5 *ib.* 122. Where a company, by the original stipulation of the members, have stipulated that two of them shall carry on the projected trade, and that all actions shall be in their name, they should sue: *Davies v. Hawkins*, 3 M. & S. 433. And, when a company is sanctioned by an act of Parliament, it generally enables them to "recover all debts; &c., in the name of their secretary: [\*702] *Guthrie v. Fish*, 3 B. & C. 178; D. & R. 24; G. & J. 245. Tenants in common may join or sever in an avowry for rent: Bac. Ab. *Joint-Tenants, K.*; 5 T. R. 249; 1 Ld. Raym. 341; see 5 B. & A. 851; 1 Lev. 109.

If one of two or more joint contractors or partners sue when they ought to join, it is a variance, and will be fatal under the general issue, *Jell v. Douglas*, 4 B. & A. 374, 2 Saund. 121, *n. 1*; or deft. may plead in abatement, Co. D. *Abatement, E. 12*; and, if it appear on the pleadings, it will be a ground of error, *ib.*, 1 Saund. 154, *a.*; or for demurrer or arrest of judgment: *ib.*; 2 Str. 1146. If too many parties be made plt.s., they will be nonsuited: 3 B. & P. 235; 6 East, 225; 1 East, 226; 2 Saund. 116, *n. 2*.

When one of several partners or persons having a joint legal interest in the contract *dies*, and the executor or administrator of the deceased can neither be joined nor sue separately, even where the deceased was alone entitled to the beneficial interest in the contract, 2 Saund. 122 (1), 1 East, 497, Salk. 444, Ld. Raym. 340, 2 M. & S. 225, a surviving partner may include a debt due to him in his own separate right, with one in the character of surviving partner, 3 T. R. 433, 5 *ib.* 423, 2 Chit. Rep. 436; but a surviving partner suing in assumpsit must be so stated, or he will be nonsuited: *Jell v. Douglas*, 4 B. & A. 374. But it is not necessary to sue as a surviving partner, when plaintiffs sue as indorsees of bills of exchange: 6 Moo. 579.

Where one of several partners becomes a bankrupt, the action must

be brought in the name of the solvent partner and the assignees of the bankrupt: 10 East, 418.

*When Partners may sue each other on a Contract.]* Where one of several partners covenants or expressly agrees to account, and neglects to do so, an action may be supported by the others, 7 Mod. 116, 13 East, 8, 538; and so where an account is stated, and one partner expressly promises: *Clark v. Glenie*, 3 Stark. 10. The account should, however, be final: 2 Bing. 170. Between partners who have covenanted by deed to account with each other, and to pay over what shall appear to be due, if they state an account, and one expressly promise to pay the balance, assumpsit may be supported, notwithstanding the deed: 2 T. R. 483, 478. Assumpsit for money had and received will lie against one who has been a member of a benefit society, for money entrusted to his keeping by the rest of the society, in the name of the persons properly appointed for managing the society's affairs under their articles: *Sharp v. Warren*, 6 Price, 131. And, where J., T., and B., were jointly concerned in the sale of goods, J. consigned them to B., who sold them on the joint account: T. being requested to accept bills for the firm, refused to do so without some security; when B. engaged, if T. paid the bills, to repay him out of the proceeds received for goods already sold. T. having accepted and paid the bills, it was held that he might sue B. for money had and received to his use: *Coffee v. Brian*, 3 Bing. 54. And, if one partner, though without the knowledge of the other, refer the claim of a third person to arbitration, and the award is against the partners, and he pay over the sum awarded to the claimant, he may sue his other partners for money paid: 4 Moo. 340. When one partner or joint-contractor pays money for another which the latter had engaged to repay, he may recover it from the other as money paid to his use: 6 Taunt. 289; 1 Marsh. 603; 8 T. R. 614; *post*, "*Money had and received*." And an action at common law is sustainable to recover a contribution in the nature of general average, by one shipper against another: 3 Camp. 480; 1 East, 220; 4 Taunt. 123. Sailors in a whaleship who receive a proportion of the profits in lieu of wages, when the cargo is sold, are not considered as partners, but may sue the captain for wages: 4 Esp. Rep. 182. And, where there is only a proposed partnership \*as in the case of subscribers, one [\*703] party may sue the other: 3 B. & C. 814. And, when the agreement between several does not constitute a partnership between themselves, but only an agreement in favour of one, as a compensation for trouble and credit, he may sue the other, though both might be liable as partners to third persons: *Hesketh v. Blanchard*, 4 East, 144; *War v. Carver*, 2 H. Bl. 235; 4 T. R. 353.

[Where one of several stage proprietors (partners) had been sued for damage by negligent driving of their servant; it appearing that there was a partnership fund, out of which the expenses were to be first paid, and the residue divided; held, that an action for contribution could not be supported by the one who had paid the damages, against his co-proprietors. *Pearson v. Skelton*, 1 Mees. & W. 504, S. C.; 1 Tyr. & Gr. 848.]

*When they must join in Action for a Tort.]* Where there is a joint damage, or an injury is committed to the joint property of a partnership,

all the partners ought to join. Thus, two partners in trade should join in an action for words spoken of them in the way of their trade: *Co. v. Batchellor*, 3 B. & P. 150; 2 East, 426. So, for injuries to personal or real property, partners, joint-tenants, and tenants in common, must join: see cases, 1 Chit. Pl. 54-5. In order to take advantage of a nonjoinder, defendant must plead in abatement, or may give the nonjoinder in evidence to apportion the damages at the trial: 1 Saund. 291, *g.*; 2 *ib.* 117; 6 T. R. 766; 1 Chit. Pl. 55. If too many be made plaintiffs, it will be a ground of nonsuit, except in detinue for charters, where it is said one may be nonsuited, and the other recover: *Co. Lit.* 197, *b.*; 3 East, 62; 12 East, 452. If the objection appear on the face of the record, deft. may demur, move in arrest of judgment, or bring error: 3 B. & P. 150; 2 Saund. 116. *a.*

In the case of torts, when one or more of several partners interested in property dies, the action should be in the name of the survivor only, and not jointly or separately, in the name of the representative of the deceased; and therefore, to an action in trover brought by the survivor of three partners in trade, it cannot be objected that the two deceased partners and the plt. are joint-merchants, and consequently, that in respect of the *lex mercatoria*, the right of survivorship did not exist; for the legal right of action survives, though the beneficial interest may not: 1 Show. 188; Carth. 170; 1 Chit. Pl. 57.

FORM OF PLEADINGS.] There is nothing in general, peculiar, relating to the form of pleadings. In the case of surviving partners, it was formerly considered that a surviving partner might declare generally upon a contract entered into with him and his deceased partner, as upon a contract made with himself alone: *Ditchburn v. Spracklin*, 5 Esp. Rep. 51. The rule is, however, changed; for, as it would be a variance, and a good defence upon the general issue, were one of two joint-contractors to sue, both being alive, so it seems to be reasonable, that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration: *Jell v. Douglas*, 4 B. & A. 374; 2 Saund. 121, *n.* 1; *Israel v. Simmons*, 2 Stark 356. In an action, however, at the suit of a surviving partner, he may include a count for a debt due to himself in his own right, 3 T. R. 443, 5 *ib.* 493, 2 Chit. Rep. 436, 1 B. & A. 29; and it is not necessary to declare as surviving partner in case of indorsees of a bill: 6 Moo. 579. And, where money is owing to two partners, and, after the death of one, it is paid to a third person, the survivor may declare for money had and received to his use: *Smith v. Barrow*, 2 T. R. 476. In actions *ex contractu*, as well as *ex delicto*, whether by or against partners, plt. must allege all the causes of action to be joint: 14 East, 210. And it has been held that a person cannot bring a joint action against two, and state in one part of the declaration that one of them assaulted and beat him, and in another part that the other took away his goods, for the trespasses are of several natures, and against several persons, and they cannot plead to this declaration: 2 Saund. 117, *a.*; 1 Chit. Pl. 183. Counts upon a promise by the deft., and another, since become a bankrupt, and certificated, may be joined in separate actions against the solvent partner alone, with counts on promises made by the deft. solely, since the other became a bankrupt, subject, however, to a plea in abatement: 6 Taunt. 179.

\* *Precedents.*

[\*704]

## DECLARATION BY A SURVIVING PARTNER, ON PROMISES TO BOTH PARTNERS.

(Commence as usual, see "*Declaration.*") For that whereas the said deft., in the lifetime of one E. F., since deceased, to wit, on, &c., at, &c., was indebted to the said plt. and the said E. F. in the sum of £—, of lawful, &c., for divers goods, wares, and merchandizes, by the said plt. and E. F. before that time sold and delivered to the said deft., and at his special instance, &c. (*Any other debt should be described in the same manner.*) And, being so indebted, he, the said deft., in consideration thereof, afterwards, and in the lifetime of the said E. F., to wit, on, &c., aforesaid, at, &c., aforesaid, undertook, and then and there faithfully promised the said plt. and E. F. to pay, &c. (*Insert the account stated with both the partners, and the promise to them.*) Nevertheless, the said deft., not regarding, &c., but contriving, &c., to deceive and defraud the said plt. and E. F. in the lifetime of the said E. F.; and the said plt., since the death of the said E. F. in this behalf, hath not as yet paid the said several sums of money, or any, or either of them, or any part thereof, to the said plt. and E. F., or either of them, in the lifetime of the said E. F., or to the said plt., since the death of the said E. F. (although often requested so to do;) but he to do this hath hitherto wholly refused, and still doth refuse. To the damage of the said plt. of £—, and therefore he brings his suit, &c. Pledges, &c.

## DECLARATION ON PROMISES TO THE SURVIVING PARTNER TO PAY DEBTS DUE BEFORE THE DEATH.

And, whereas, also, the said deft. afterwards, in the lifetime of the said E. F. deceased, to wit, on, &c., aforesaid, at, &c., aforesaid, was indebted to the said plt. and to the said E. F., in the further sum of £—, in like lawful money, for divers goods, wares, and merchandize, by the said plt. and the said E. F. before that time sold and delivered to the said deft. and at his like special, &c.; and also in the further sum of £—, of like lawful money, for, &c. And the said deft. being so indebted, and the said several sums of money in this count mentioned being and remaining wholly due, unpaid, and unsatisfied, he, the said deft., in consideration thereof, afterwards, and after the death of the said E. F., to wit, on, &c., at, &c., aforesaid, undertook, and then and there faithfully promised the said plt. to pay him the said several sums of money in this count mentioned, when he, the said deft., should be thereunto afterwards requested. (*Add an account stated, or other counts on promise to the plt. only, without noticing the deceased, and conclude as supra, to the damage of the plt. only.*)

*Evidence for Plaintiff.*

*Proof of Cause of Action.*] This will be the same as in other cases.

*Proof of Partnership.*] In actions by partners, to recover a partnership demand, unless the contract which is the foundation of the action has been expressly made with all the members of the firm, *Evans v. Mason*, Cowp. 569, it will be incumbent on them to prove that all the plts. were partners at the time of the contract, *Camden v. Anderson*, 5 T. R. 709; and thus, in an action by several partners for goods sold, if one of them joins in an action, who, at the time of the contract was not a partner, but who afterwards becomes such, and, by agreement among the partners, was to have a share in the profits from a time preceding the contract, the plts. will be non-suited, *Wilford v. Wood*, 1 Esp. Rep. 182; and the effect will be the same, if any one of those who were partners at the time be omitted: *Leglise v. Champante*, 2 Str. 820; *ante*, 702. If the plt. sues a surviving partner, he must prove the partnership, as in other cases; but it will not be necessary to prove the death of the deceased. Where business has been carried on in the names of several, one of them may still support an action of assumpsit, provided he expressly prove that the \*others [\*705] were not, in fact, partners, *Teed v. Elworthy*, 14 East, 210; and

a party, in whose name the business has been carried on as a co-partner, is competent to prove that in fact he was not a partner: *Glossop v. Colman*, 1 Stark. 25.

It is a general rule, that all contracts and transactions, &c., made with, to, or by several partners in the course of the joint trade, are construed by law to be made to and for all of them, and all are entitled to take advantage of them; and, whether they be express or implied, the legal consequences will be the same: *Watson*, 111; 3 Price, 544; *Skinner v. Stocks*, 4 B. & C. 437.

Partnerships are usually proved by the oral testimony of clerks, or other agents or persons, who know that the alleged partners have actually carried on business in partnership, as it is unnecessary to produce any deed or other agreement by which the co-partnership has been constituted: *Alderson v. Clay*, 1 Stark. 406; see further, *post*, as to strict proof of partnership. If witness called by the partners to prove the partnership is unable, at the moment, to specify the several names of the partners, a number of names, containing those of the partners amongst others, may be suggested to him for the assistance of his memory: *ante*, 289; *Accero v. Petroni*, 1 Stark. 100. As to proof when several persons sue on a bill, *ante*, 288-9; as to when partners may sue each other, *ante*, 702. To prove a strict partnership between the partners *themselves*, there must be an agreement, either express or implied, between them, that each shall reciprocally participate in the loss as well as in the profit of the concern; and the mere sharing of one of these without the other will not constitute a partnership: 17 Ves. 404; *Morse v. Wilson*, 4 T. R. 353. Where a party receives profits in lieu of wages, he is not a partner, and may sue for his services: *Hesketh v. Blanchard*, 4 East, 144; *Mair v. Glennie*, 4 M. & S. 244; *ante*, 702; and see *Gale v. Leckie*, 2 Stark. 107; *Holmes v. Higgins*, 1 B. & C. 74. A number of persons associating together, and subscribing sums of money for the purpose of obtaining a bill in parliament to make a railway, are partners in the undertaking: and one subscriber cannot recover against others, 2 D. & R. 196; 1 B. & C. 74, *s. c.*; and see *Sir J. Perring v. Hone*, 4 Bing. 28; 13 Moo. 365, 135, and cases. As to partners in a coach concern, see 2 Bing. 170; *Barton v. Hanson*, 2 Taunt. 49. [The clerk of a company of stage-coach proprietors who makes up the accounts monthly is to be deemed the clerk of all parties, and need not be called, his accounts being evidence against all; and, the balances not being carried forward, the partner in whose favour the balances appear is entitled to maintain an action to recover them: *Brierly v. Crips*, 7 Car. & P. 709.] Where, after the dissolution of a partnership between A., B., and C., C. drew bills in the names of all the partners, in favour of a person, who afterwards recovered on them against A. and B., and the judgment against them was satisfied by their attorney, who advanced part of the money himself, and borrowed the rest on the credit of A. and B., it was held, that A. and B. might recover in a joint action against C. the sum so paid, as it was paid by the attorney on the joint credit of the pts.; therefore, the consideration being joint, the implied contract was joint also: *Osborne and another v. Harper*, 5 East, 226. Where A. and B., together with C. and D., were owners of one ship, and E. owner of another, and a prize, being taken by both ships, and condemned, was shared between them; but afterwards, the sentence of condemnation being reversed, and restitution awarded with costs, the costs

were paid by A. and B., C. and D. having in the meantime become bankrupts, it was held, that an action could not be brought by A. and B. against E., for his proportion of the money so paid, as it was either a partnership transaction, when C. and D. should have been joined, or not, when separate actions should have been brought by A. and B.: *Graham and others v. Robinson*, 2 T. R. 282.

### *Evidence for Defendant.*

Deft. may nonsuit the plts. on establishing a misjoinder of too many, or non-joinder of too few plts.: *ante*, 702. With respect to what acts by one partner are binding on the other, he will be bound by the purchase, 1 Camp. 185; payment, 15 Ves. 213; *Leigh v. Shepherd*, 2 B. & B. 465; \**Henderson v. Wild*, 2 Camp. 561; *Malkin v. [\*706] Vickerstaff*, 3 B. & A. 89: delivery, or any other act or transaction, made by, to, or with his partner, relating to and on account of the partnership trade, however disadvantageous the act may be to him, as by the partners selling the effects, borrowing money, pledging the credit or property, or releasing the debts of the partners, apparently on account of the partnership, and not on his own account: see 3 Chit. Com. L. 238; 2 Co. 68; 3 Bing. 103; Godb. 244; *Rothwell v. Humphreys*, 1 Esp. Rep. 406; *post*, "Release." And this liability also cannot be shifted or affected by any previous existing or subsequent arrangement between the partners themselves, without notice to the deft.: *Smith v. Jameson*, 5 T. R. 601; *Waland v. Elkins*, 1 Stark. 272. A partner is bound by the admissions, representations, or notice made by or to his co-partner: *Nicholls v. Dowding*, 1 Stark. 81, 161; Doug. 651; *Lucas v. Delacour*, 1 M. & S. 249; *Rapp v. Latham*, 2 B. & A. 795; *Bignold v. Waterhouse*, 1 M. & S. 259; and see further, *post*, 710, as to the partnership liabilities. One partner cannot bind the others by a submission to arbitration: 3 Bing. 101; *post*, 711. In answer to an action by partners, it will constitute a sufficient defence, that one of the partners has been guilty of a fraud. Thus, where goods were sold by one of several partners, he residing at Guernsey, and were packed there for the purpose of being smuggled into this country, such transaction will defeat an action brought by him jointly with the other partners: *Biggs v. Lawrence*, 3 T. R. 454. And it has been held, that A., B., and C., could not recover on a bill of exchange drawn by them, and accepted by the deft., A. having, in fraud of his partners, undertaken to provide for the acceptance when the bill becomes due: *Richmond v. Heapy*, 1 Stark. 102. Thus, where A., being a partner with B., in one mercantile house, and with C. in another, and the house of A. & B. indorse a bill of exchange to the house of A. & C., after which B., acting for the house of A. and B., received securities to a large amount from the drawer of the bill, upon an agreement by B. that the bill should be taken up and liquidated by B.'s house, it was held, that A., being bound by the act of his partner, could not, in conjunction with C., sue on the bill against the acceptor: *Jacaud v. French*, 12 East, 317.

### *Competency of Witnesses.*

Partners may, in some instances, be admitted as witnesses in actions instituted on behalf of the firm, where they are not made parties, and the

interest they may possess in the event will not disqualify them from giving their testimony; thus, where a person, who has no interest in the capital of a firm, or its profits, suffers his name to be used as a partner, he is a competent witness in an action commenced by the actual proprietor of the concern, to prove a contract made with such proprietor in the joint name: *Parsons v. Crosby*, 3 Esp. Rep. 199. And, in an action on a contract, a dormant partner, not being one of the contracting parties, and who has had no privity of communication with them on the subject of the contract, is competent to prove the contract: *Mawman v. Gillett*, 2 Taunt. 325. So, a party is competent, although he has purchased from the plt. an interest in the contract on which the action is brought: 3 Stark. Ev. 1084. And, where there is an agreement, upon the dissolution of a partnership, that each of the partners shall receive certain debts, either partner is competent, in an action by the other partner, against a debtor to the firm, to prove payment to him according to the agreement: *Evans v. Silverlock*, Pea. Rep. 21. And, in an action by several partners against the debt. for the non-performance of an agreement, a declaration by one of the partners, that the goods to which the agreement related were his separate property, and had been allotted to him out of the partnership stock, is evidence against the plt.'s suing as upon a joint contract: *Lucas v. Delacour*, 1 M. & S. 249; Gow, 155. As to competency of party to prove he was not a partner, *ante*, 705; 1 Stark. R. 25.

[\*707]

## II. ACTIONS AGAINST.\*

FORM OF REMEDY AND PARTIES TO ACTION, 707.

FORM OF PLEADINGS, 706.

PRECEDENTS, 708.

EVIDENCE FOR PLAINTIFF, 709.

EVIDENCE FOR DEFENDANT, 711.

FORM OF REMEDY AND PARTIES TO ACTION.] There is nothing peculiar relating to the form of remedy in actions against partners.

*When they must all be sued on a Contract.*] All persons who have a joint interest in a joint contract, at the time of its being entered into, must be made defts.: 1 Saund. 153; *n.* 1, 291, *b. n.* 4. And persons may be jointly liable as partners, not only by being expressly contracted, but by holding themselves out to the world as partners: 16 East, 174, *post*, 709. And it will make no difference, though the partners may have agreed amongst themselves to make some particular partner alone liable: 3 B. & C. 611. And, even where a contract was made by two partners to pay a sum of money to a third person, "equally out of their own private cash," it was held that they should be jointly sued on it: 1 H. Bl. 236. When the liability of partners arises from their joint interest, such joint interest must be contemporaneous with the contract itself. Where a man purchases goods, and another is afterwards permitted to share in the adventure, the vendor cannot sue the latter for the price of the goods, *Young v. Hunter*, 4 Taunt. 582; but, where they agree to share in the future purchase of goods, a joint interest attaches, the instant they are purchased: 12 East,



491. Partners in a contract should also be joined, although one of them is an infant, 3 Taunt. 307; unless the action be brought upon such contracts as, if made by infants, are void, and not merely voidable, as upon bills, &c., in which case the infant should not be joined, but the plt. should declare on it as accepted, &c., by the adult partner in the names of both: 4 Taunt. 468; 6 *ib.* 179; 2 M. & S. 23. And they must all be joined, though one of the partners may have become a bankrupt and obtained his certificate: 2 M. & S. 23. As to dormant partners, and mere nominal partners, it seems they need not be joined: 3 Stark. 8; 1 D. & R. 584; 3 Price, 536; 1 Stark. 272, 338; Holt. C. 253; 2 Camp. 302; *contra*, 1 Marsh. 246. The plt. may, however, join them, if he can prove them to be such, 7 East, 209; 1 H. Bl. 37; 1 M. & S. 412.

Parceners should, before partition, be jointly sued, though they be entitled to the estate by different descents: Rep. temp. Hardw. 398; Vin. Ab. *Parceners*. And, if a parcener be sued alone for any matter relating to the property in co-parceny, he may plead that there is another co-heir not named; Th. D. *l.* 5, c. 1, although the other not named be within age, or although the parceners be by several descents: 42 Ed. III., 17. So joint-tenants should be joined in all actions relating to their joint property; and, if one be sued alone, he may plead that he holds jointly with another who is alive and not named, Co. Lit. 180, *b.*; or he may plead joint-tenancy with his wife, though the wife die pending the writ: Th. D. *l.* 11, c. 28, s. 31, &c. And in the case of a personal chattel, if one of two or more joint-tenants or tenants in common, by the sale thereof, convert the same into money, the joint interest is determined; and each [\*708] \*having a separate interest for a certain sum, may support an action against the other: Willes, Rep. 209; 8 T. R. 188.

When parties contract *jointly and severally*, they may be sued jointly in assumpsit, as the one thereby makes himself responsible for the other, or separately. Therefore, where two several tenants of a farm agreed with a succeeding tenant, to refer to arbitration certain matters in dispute respecting the farm, and jointly and severally promised to perform the award, and it was awarded that a sum of money should be paid by each of the two to the third, it was held, that they were liable to be sued jointly for the sums awarded to be paid by each: *Mansel v. Burrage*, 7 T. R. 352. But, if there be more than two several parties to a joint and several contract, it is usual to sue all jointly, or each separately, 3 T. R. 782, 1 Saund. 291, *e.*; and in some cases where the party declares on an express contract, it is necessary; but where plt. sued three persons, and declared on a bill of exchange, drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by three, jointly with a fourth, plt. recovered, and it was held to be no variance: *Mountstephen v. Brooke*, 1 B. & A. 224. It is, however, advisable to sue separately; for, in the case of a joint-action, if one of the debts die after judgment, and before execution, there is no remedy at law against the assets of the deceased: *Com. D. Action*, K. 4; 2 Saund. 50, *a.* But, if the plt. proceed separately, the executor of the deceased, as well as the survivor, continue severally liable at law: 2 Burr. 1190. It has been held, that overseers are not jointly liable for money lent to one overseer as such, unless all expressly promise to pay: 3 Stark. 65; 3 B. & A. 89. And though several parishioners joined at a vestry, in signing an order, authorizing two churchwardens to repair the church, such parishioners are not jointly or sepa-

rately liable: *Lanchester v. Trewer*, 2 Bing. 361; *Same v. Tricker*, 1 id. 201.

Where one of the partners dies, plt. must sue the survivor alone, without adding the executor of the deceased partner, Carth. 170-1, 3 Lev. 290; and the survivor will be liable in his own right, without alleging him to be a surviving partner: 2 T. R. 479.

The mode of taking advantage of the *omission* of a partner in a contract as deflt. has been already noticed: *ante*, 14. If *too many* parties be made defts., and the objection appear on the pleading, the defts. may demur, move in arrest of judgment, or bring error, 7 T. R. 352; and, if the objection do not appear on the pleadings, the plt. will be nonsuited at the trial, on failing to prove the partnership of all: 1 East, 52; 1 Lev. 63; 1 Esp. Rep. 363; 1 Chit. Pl. 94.

*Where they should be jointly sued for Torts.*] In cases of torts, partners, as such, can seldom be guilty in their joint capacity: the law, in some cases, however, considers them as joint-trespassers, and renders them liable to the consequences which attach to the wrong doer himself: Gow. 160. Where several persons are liable as joint-tenants, or tenants in common in respect of their real property, they should all be made defendants, though the action be in form *ex delicto*, or it will be a cause of abatement: 1 Saund. 291; 5 T. R. 651.

*Form of Pleadings.*] There is nothing peculiar relating to the form of the pleadings, except that care must be taken, that all the causes of action be stated to be joint; 1 Chit. Pl. 183. In an action against a surviving partner, a cause of action against him only may be proved: 1 B. & A. 29; 2 Chit. R. 436.

### Precedents.

#### DECLARATION AGAINST A SURVIVING PARTNER, FOR GOODS SOLD, &c.

(Commencement as usual, see "*Declaration*.") For that whereas the said [\*709] deflt., and one E. F., in his lifetime, now deceased, and whom the said deflt. hath survived, on, &c., at, &c., were indebted to the said plt. &c., for the work and labour, &c., of the said plt., by the said plt. before that time done, &c., for the said deflt. and E. F., and at their special instance, &c.; and, being so indebted, they the said deflt. and E. F., in consideration thereof, afterwards, and in the lifetime of the said E. F., to wit, on, &c., aforesaid, at, &c., aforesaid, undertook, &c. Nevertheless, the said deflt. and E. F., in the lifetime of the said E. F. and the said deflt., since the death of the said E. F., not regarding their said several promises, &c., but contriving, &c., have not, nor hath either of them, as yet paid, &c. (although often requested so to do,) but to pay the same, or any part thereof, to the said plt., the said deflt. and E. F., in the lifetime of the said E. F. wholly refused, and the said deflt. hath, ever since the death of the said E. F. hitherto wholly refused and still refuses so to do. (*Insert a count on promises by the surviving partner, or, more especially, the amount stated, without noticing the deceased.*) To the damage, &c.

### Evidence for Plaintiff.

*Proof of Partnership.*] In actions against several as partners, the plt. must prove that all the defts. were jointly interested in the demand on which the action is founded, at the time it accrued, *Young v. Hunter*, 4 Taunt. 584: this may be proved, by showing that they held themselves

out as partners, or that they jointly participated in the profits of the concern with respect to which the action is brought. It is essential, in a joint action against several, that there should be sufficient evidence to affect every individual deft., as a joint partner; for, if the plt. fail to fix any one of them, he will be non-suited: *Young v. Hunter*, 4 Taunt. 582; *ante*, 708.

The evidence to constitute a partnership, by parties holding themselves out to the world as partners, must necessarily depend on the circumstances of each case. The fact is usually proved by *viva-voce* evidence of persons acquainted with the defts. and their dealings. A member of a firm, who retires will be liable, on account of the remaining members continuing his name in the firm, though without his consent or knowledge, unless he has taken the necessary precaution, as by giving advertisements, notices, &c., to the world, that he has discontinued being such member: *Newsome v. Coles*, 2 Camp. 617; *post*, 712, 2 H. Bl. 242. But, if a creditor knows that a party is but a mere nominal partner, and has no interest in the profits to make him an actual partner in the eye of the world, the latter will not be liable to such creditor as a partner, *Alderson v. Pope*, 1 Camp. 404, *n. a.*; unless, indeed, it be proved there was an understanding that he had ceased to receive profit, yet his name was to continue in the firm for their benefit: *Brown v. Leonard*, 2 Chit. Rep. 120. The fact of partnership may be proved by acts or declaration of the defts. themselves, who acknowledge it, *Gibbons v. Wilcox*, 2 Stark. 43; as, where a person represents himself as a partner, and is trusted as such, he is bound thereby: *De Berkam v. Smith*, 1 Esp. Rep. 29; 2 Moo. 153. Parties jointly employing an attorney to do an act, are liable as partners; *ante*, 158. Where a bill is drawn, on a firm, the acceptance by an individual, in their name, is evidence to charge him as a partner: *Spencer v. Billing*, 3 Camp. 312; *Carrick v. Vickery*, Doug. 653; 16 East, 174. So, an entry at the Excise Office, by one partner, in his name, and that of his partners, is evidence against him of his partnership: *Ellis v. Watson*, 2 Stark. 453. And where it appeared that all the defts. had been outlawed, except one, a letter written by him, in which he acknowledged being a partner, with the co-defts., was held to be evidence of the partnership, as the record in that action would not be sufficient evidence in any future action that might be brought by the then deft. against the co-defts., for contribution, to prove that they were parties to the promise; and it would be incumbent on him to prove the fact by ulterior evidence: *Sangster v. Mazurredo*, 1 Stark. 161. But, where a \*particular transaction [\*710] only is under discussion, and a person acknowledges himself to be the partner of another in it, he will not be bound by a contract unconnected with the particular object: *De Berkam v. Smith*, 1 Esp. Rep. 29. But the act or admission of one partner is inadmissible against the other members of the firm, unless the partnership be established: *Spencer v. Billing*, 3 Camp. 312; 14 East, 226; 16 *id.* 169; 3 Camp. 240; 5 Esp. Rep. 31. And no act done by third persons, which may affect to treat them as joint owners, is evidence, unless it appear that such act has been recognized by them. Thus, for the purpose of charging two persons as joint purchasers of a cart, an entry of such cart in the tax-gatherer's book, as the property of both, is not evidence, without showing that the parties authorized or adopted the entry: *Weaver v. Prentice*, 1 Esp. Rep. 369. Upon the same principle, an entry in books, kept in the office for

licensing stage-coaches in Somerset House, is no proof that the person specified in the license are owners of a coach: *Strother v. Willan*, 4 Camp. 24. Though the acts and admissions of a person, made subsequently to a contract, are admissible to prove him a partner at the time of the contract, yet, if it be clearly established that he was not then a partner, his subsequent admission will not render him liable: *Saville v. Robertson*, 4 T. R. 720.

The evidence to constitute a partnership by a joint participation in the profits of the concern in question, must depend on the facts. A joint participation in the profits of a trade or concern, as profits, without a participation in the losses, constitutes a partnership, so as to make the parties participating in such profits liable as partners to third persons: *Wagh v. Carver*, 2 H. Bl. 235, *Reid v. Hollinshead*, 4 B. & C. 867, 7 D. & R. 646, 2 B. & C. 401, 6 B. & C. 344, 18 Ves. 301; and this, although a party has no interest in the capital, or no apparent one in the participation of the profits, and though the division of the profits be ever so unequal. An agreement to pay so much out of the profits of the concern, for the labour of a party, or to pay an outgoing partner an annuity for his interest in the profits and good-will in the business, is no partnership as to third persons: *ex. p. Hamper*, 17 Ves. 404; 19 *ib.* 431. The interest must be joint at the time of the contract: *Young v. Hunter*, 4 Taunt 582; see 3 Bing. 143; *Saville v. Robertson*, 4 T. R. 724. The interest must be in community: *Hoare v. Dawes*, Doug. 371; 1 H. Bl. 37. A liability under this species of partnership would be discharged, if the creditor, knowing the partnership, gave credit to one of its members only: *Malkin v. Vickerstaff*, 3 B. & A. 89; *Forster v. Taylor*, 3 Camp. 51, 168; 3 Chit. Com. Law, 232; *Lyall v. Reed*, 1 C. & P. 16; *Delawney v. Strietland*, 2 Stark. 416. A partnership of this nature may be proved by a party well acquainted with the fact of such partnership, and if there be any agreement by deed between the parties, a notice should be served on them to produce the same, and the service of such notice proved.

*Proof of Defendant's liability.*] When the partnership has been established, evidence may be adduced to show the deft.'s liability, as partner, for the acts of one or all of them. It is an established rule, that partners are bound by the acts of their co-partners, made in the course of, and with reference to, the partnership business, and in the regular course of dealing by the firm, see *Watson*, 166, 3 Chit. Com. L. 237, Chit. B. 29, 7 ed.; and it makes no difference, although the other partners were ignorant of the transaction, and were even intentionally defrauded by their partner: *id.* Thus, one partner may buy, *Bond v. Gibson*, 1 Camp. 185, or sell, the partnership property, *Godb.* 224, receive payment of, or release the debts, *Kemble v. Atkins*, Holt, 434, 1 Cowp. 481, 2 Co. 68, *Stead v. Salt*, 3 Bing. 103, or borrow money, 1 Esp. Rep. 106, or pledge the partnership property, *Baker v. Charlton*, Peake, 79, *Read v. Hollinshead*, 4 B. & C. 867, 7 D. & R. 444, 4 Taunt. 684; and by such acts bind the [\*711] partnership.\* As to his power to bind the partnership by bills, see Chit. B. 7 ed. 29 to 40. One partner agreeing to pay a debt assigned over by their creditor to a third person, renders the rest liable: 4 D. & R. 7. But the implied authority of a partner does not enable him to execute deeds in the name of the firm: *Ball v. Dunsterville*, 4 T. & R. 319; *Harrison v. Jackson*, 7 T. R. 207; Holt, 143. Nor can he bind the

firm by submitting to arbitration, 3 Bing. 101, *sed vide*, 4 Moo. 340; nor by making a guarantee, *ex p. Gardom*, 15 Ves. 280, *Duncan v. Lowndes*, 3 Camp. 478; unless the partners were accustomed to give such guarantees, or the same was given in the course of their dealing: *Sandilands v. Marsh*, 2 B. & A. 673; Peake, 79. And see how far the liability of the partnership may be relieved by notice to plt., *infra, post*, 712. The subsequent approval and recognition, by the firm, of the act or contract of one of the partners, or their privity and silence, affords strong evidence that he was invested with a sufficient authority to bind the partnership, 8 Ves. 540, 2 M. & S. 484, *Duncan v. Lowndes*, 3 Camp. 478, *Sandilands v. Marsh*, 2 B. & A. 673; but, if it clearly appear no partnership whatever existed at the time of the contract, no subsequent act, by any person who may afterwards become a partner (not even an acknowledgment that he is liable, nor his accepting a bill drawn on them as partners, for goods sold to his other partner, before the partnership) will make him liable in an action for goods sold and delivered, although he will be liable to an action on the bill: *Saville v. Robertson*, 4 T. R. 720.

Partners are not liable for the wrongs of each other, unconnected with contracts; but they are liable for the negligence, &c., of a partner in performance of a contract connected with their joint trade, Cowp. 814; and partners, like individuals, are responsible for the negligence of their servants, in the course of their business: *ib.*; Bunb. 97, 233; Co. R. 676.

As to the effect of admissions and representations made by partners, see *ante*, 51, 709, 710; notice to one partner is notice to all: 1 M. & S. 1259; Camp. 404, *n*.

#### *Evidence for Defendant.*

The deft.'s evidence will consist in rebutting the plt.'s proofs as to the partnership, and deft.'s liability. As to the application of payments, in liquidation of claims on partnership, *post*, 717. One partner may show that he is not liable, by proving that he gave express notice to the plt. that he would not be responsible for the acts of his co-partners. Thus, where A. and B. were partners, and A. gave notice to a creditor to deliver no goods to B., without A.'s concurrence, the creditor cannot recover for goods delivered to B., without proving that A. adopted the rule, or derived benefit from the goods: *Willes v. Dyson*, 1 Stark. 164; *Ld. Galway v. Matthew*, 10 East, 264.

It will also be a sufficient defence to show, that one of the partners acted collusively, and for his own benefit, though in the name of the partnership, and that it was known to the plt., *Sheriff v. Wilks*, 1 East, 48; and evidence of this may be presumed from the facts of the case. Thus, where the plts., Sheriff and another, drew a bill for a balance due from Bishop and Wilks for porter sold to them, exclusively of Robson, another partner, and they tried to charge Robson, as well as Bishop and Wilks, by Bishop's accepting the bill in the name of the firm, it was held, that plts. must have been aware of the fraud, from the nature of the transaction, and that collusion between the plts. and Wilks might be inferred: *Sheriff v. Wilks*, 1 East, 48. But, where the plts., the separate creditors of one partner, take the joint security of the firm, without consulting all its members, it will not be a sufficient inference of fraud: *Ridley v. Taylor*, 13 East, 175, *Wintle v. Crowther*, 1 Crompt. & Jerv. 316. Where the

plt. had, previous to the formation of the partnership, advanced a sum of money to one of the intended partners, to enable him to become one of the firm, it was held the plt. could not recover on a bill afterwards [\*712] drawn by such party in the name of the firm, in payment of "such advance; and that the other partners might defend the action, without giving any notice of the intention to dispute the consideration: *Green v. Deaken*, 2 Stark. 347. And, in an action on a bill against three acceptors, by the indorsee, where it appeared that the defts. were partners in a tea speculation, and the drawer, a wine merchant, drew in payment of wine delivered to one of the three, the Judge directed the jury, that if they found that the bill was so drawn, without the knowledge and consent of the other defts., they were not liable, and the jury found for the defts.: *Wood v. Holbec*, Chit. B. 7, ed. 34.

Def't. may also show that the partnership had been dissolved when the demand accrued, and that the defts. have given sufficient notice of that fact. Proof of notice to plt. may be shown, either by proving express notice of the dissolution given to the plt. by letter, &c., or by a due notice published in the gazette. Where no express notice has been given it is requisite that public notice should be given through the gazette: *Gorham v. Thompson*, Peake, 60, 208, n.; *Godfrey v. Turnbull*, 1 Esp. Rep. 371. And, unless such be proved to have been given, a plt., continuing to deal with the firm, may recover against any of the original parties, though he may have retired: *Parkins v. Carruthers*, 3 Esp. Rep. 248. If the plt. had been formerly in the habit of dealing with the firm, it should be shown that a special notice had been given to him of the dissolution of the partnership: *Graham v. Hope*, Pea. Rep. 208. This may be done by showing that a printed circular had been left at plt.'s house, in which case it would be sufficient to produce and prove a duplicate original: 2 Stark. Ev. 1078. And it will be insufficient, in this case to show merely that the dissolution had been advertised in the gazette, or in public newspapers, unless it be first proved that the plt. read an impression of the paper, and even then it will not be conclusive, if it were only by way of advertisement: *Jennings v. Blizard*, 1 Stark. 418. And evidence of the notoriety of the dissolution is insufficient if no notice has been given: *Graham v. Thompson*, Pea. Rep. 42, 60. A public notice in the gazette will exonerate a former partner from all contracts entered into with persons who commenced dealing after such notice has been given: *Newsome v. Coles*, 2 Camp. 617. An alteration in the names of the firm of a banking-house, contained in their checks, is a sufficient notice to any customer to whom they have been delivered: *Burfort v. Goodall*, 3 Camp. 147. Proof of notice of dissolution is unnecessary, where the partner was always a dormant one: *Evans v. Drummond*, 4 Esp. Rep. 89; *Newmarsh v. Clay*, 14 East, 239. Proof of notice of dissolution will not avail defts., if plt. can prove subsequent conduct, and declarations of the co-def't., leading the world to suppose that the partnership still subsisted: *Newsome v. Coles*, 2 Camp. 617; *ante*, 709; *Williams v. Keats*, 2 Stark. R. 291; *Brown v. Leonard*, 2 Chit. Rep. 120.

## PAYMENT.

PLEADINGS AS TO.] In assumpsit, or debt on simple contract, the defence of payment need not be pleaded specially, and may be given in evidence under the general issue, *Ld. 1 Raym. 217*; but it may be pleaded specially, *1 Salk. 394*; *1 Ld. Raym. 787*, and must be so, in all cases of payment made after action brought: *Holt, C. N. P. 6*; *4 B. & A. 345*; *2 Taunt. 203*. In covenant, or debt on a specialty, it must be pleaded specially: *1 Chit. Pl. 423, 426*; *4 Anne, c. 16*. Where no interest has been paid on a bond after the time mentioned in the condition, and there \*is no other circumstance to negative the presumption of [\*713] payment on that day, arising from twenty years having elapsed, then the plea may be *solvit ad diem*; but, otherwise, it should be *solvit post diem*: *1 Str. 652*. A plea of payment to an action on record, is not good at common law; but, by *4 Anne, c. 16, s. 12*, payment may be pleaded to an action on a judgment, if the whole judgment be satisfied: *1 Chit. Pl. 496*.

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*Precedents.*

## PLEA OF SOLVIT AD DIEM TO DEBT ON BOND.

(*Actio non after cravingoyer, as ante, 409.*) Because he says that he, the said deft., on the said \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, aforesaid (*the day for payment stated in the condition.*) in the said condition of the said writing obligatory mentioned, paid to the said plt. and said sum of £—, in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at, &c., aforesaid. And this, &c. (*Conclude with a verification as post, 725.*)

## THE LIKE OF SOLVIT POST DIEM.

(*First plea, solvit ad diem, as supra; secondly, actio non, as post.*) Because he says that he, the said deft., after the said \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, in the said condition mentioned, and before the exhibiting of the bill of the said plt. in this behalf, (*or, if in C. P., or by original, "before the commencement of this suit,"*) to wit, on, &c., at, &c., aforesaid, paid to the said plt. the said sum of £—, in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition of the said writing obligatory. And this, &c. (*Conclude with a verification, as post, 725.*)

## PLEA OF PAYMENT TO DEBT ON JUDGMENT.

(*Actio non, as post.*) Because he says, that, after the recovery of the said judgment, and before the exhibiting of the bill of the said plt. against the said deft., in this behalf (*or, if in C. P., or by original, "before the commencement of this suit,"*) to wit, on, &c., at, &c., aforesaid, he, the said deft., paid and satisfied to the said A. B. the said sum of £100, in form aforesaid recovered. And this, &c. (*Conclude with a verification, as post, 725.*)

See other precedents of plea, payment of debt on annuity-bond, *3 Chit. Pl. 976*; to debt on bail-bond, *ib., 982*; in covenant, *ib., 1001, 1009*; in replevin, plea of payment of rent to ground landlord, *ib., 1190*; replication denying payment, *ib., 1174*.

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*Evidence.*

To support this defence the deft. must prove that *he* made a *payment* in money, or its equivalent, to the *plt.*, in discharge of the debt claimed.

*Proof that Deft. paid.]* It must be proved that the deft., or some one on his behalf, made the payment in question. A payment made by a person on deft.'s behalf, though not expressly authorized by deft. so to do, will inure to deft.'s benefit, at his option. A payment made by any party to a bill, and even by a total stranger, is sufficient: Chit. B. 280. Payment of a bill of exchange by the acceptor, will discharge all parties to it, 1 Str. 515, Chit. B. 347; so does the payment of a bill by a prior party discharge subsequent parties: Chit. B. 146. As to payments by arrangements between parties, see *ante*, 573, *post*, 14.

*Proof that Payment was to Plt.]* The payment must be proved to have been made to the plt., or one on his behalf. Payment to one of several partners, or co-plts., is enough, *ante*, 705; *King v. Smith*, 4 C. & P. 108; payment to one of several trustees is sufficient; but payment to one of several assignees of a bankrupt is not: see *ante*, 241; 6 B. & C. 56.

[\*714] \*As to payments to bankrupts, *ante*, 242, 311. If one of several plts., or a nominal plt. suing for another person beneficially interested, fraudulently, and by collusion with the deft., give him a receipt for the debt, and yet no money pass between them, the court will, on application, preclude the deft. from availing himself of such receipt, Tidd. 730, 1 Chit. Rep. 391; and, if one of the two plts. fraudulently give a receipt without consideration, this shall not, even at the trial, affect his co-plt.: *Skeife v. Jackson*, 3 B. & C. 421; 5 D. & R. 290, *s. c.* Payment to an executor who has obtained probate of a forged will, is a discharge to an action brought against the debtor by the rightful administrator, on revocation of the probate, *Allen v. Dundas*, 3 T. R. 125; but a payment under the supposed will of a living person would be bad: *ib.* 130; *Wolley v. Clark*, 5 B. & A. 744. Payment by a debtor to a third person, in pursuance of an order given by the creditor, is good, so as to operate as a payment to the creditor: *Hodgson v. Anderson*, 3 B. & C. 852; 5 D. & R. 746, *s. c.*; 3 T. R. 180. The debt is certainly absolutely discharged and paid, if the order be acted upon, and the third party receive the account in pursuance thereof; and the third person cannot rescind the order after the debtor has pledged himself to the third person to obey the same; in such case, the right of the third party to receive the money from the debtor is complete, and consequently the debt is extinguished as against the creditor: *ib.* Chit. Cont. 278; 3 T. R. 180; *ante*, 673.

A payment to an authorized agent is sufficient. His authority may be inferred by the relative situation of the parties; the possession of papers, &c., the usual course of trade, or recognition of their acts, and which depend upon facts, the sufficiency of which the jury are to determine. Thus, a payment made to a clerk or servant, in a shop or other place, entrusted with the sale of goods, is as effectual as if made to the master, on proof of such person acting in such employ; 5 Burr. 2688; 12 Mod. 87. But, where A., having purchased goods of B. on credit, gives notice to B. that in future he shall always pay ready money, and does so to the servant, who embezzles the money, A. will be liable, unless he proves the notice to have reached B.; and the master is not bound by the payment to the servant, from their having been a change in the usual mode of dealing: *Grattand v. Freeman*, 3 Esp. Rep. 83; *Hazard v. Treadwell*, 1 Str. 506; 3 Salk. 234; 1 Ld. Raym. 224. Where payment is made to one having



the custody of deeds, bills, bankers' checks, &c., that fact is sufficient presumptive evidence, of his authority: *Owen v. Barrow*, 1 N. R. 101; 12 Mod. 564; 1 Chit. Pl. 193; 2 Eq. Ca. Ab. 709. In mercantile transactions, the usual authority attached to particular agents in transacting of business, is sufficient evidence from which to infer their power of receiving payment; as, where a broker makes out the bought and sold notes to the buyer and seller, 11 East, 36-8; see 6 G. 4, c. 94, s. 4; and, where the agent sells in that character, but does not disclose the name of his principal at the time, yet, if the disclosure be made before payment, the principal comes into his full rights, and a payment under such circumstances would be an effectual one to the principal: *Morris v. Cleasby*, 4 M. & S. 573. And, if the broker sells goods in his own name to the purchaser, and there be no countermand from the principal, a payment to the broker is good: *Coates v. Lewis*, 1 Camp. 444. *Moore v. Clementson*, 2 ib. 24; 3 B. & P. 485; 1 M. & S. 147. In cases where payments are made to the agents after countermand, they are still valid, if the principal owe the factor a balance, as he will be entitled to his lien on the debt: *Drinkwater v. Goodwin*, Cowp. 251. Proof of recognition, acquiescence, or silence in a matter, will be proof of the master's consent, as where a party sent his servant to receive money, and he took a bill, at which the master did not dissent immediately: *Ward v. Evans*, 2 Salk. 442; *Watkins v. Vince*, 2 Stark. 368; further, *post*, "*Principal and Agent*."

Payment to an attorney employed by plt. is as binding as to plt. himself,\* *Coore v. Callaway*, 1 Esp. Rep. 115-6, even [\*715] though such attorney had been previously changed, without leave of the court: *Powell v. Little*, 1 W. Bl. R. 8. And a payment made to the attorney on the record is always sufficient: *Croser v. Pilling*, 4 B. & C. 231, 289, 6 D. & R. 129, unless it be proved that he has never been employed by the plt., 1 T. R. 62; but payment to a country attorney, who is merely employed by the attorney of the principal, is insufficient: *Fates v. Frickleton*, Doug. C. 23-4; Tidd, 93. And, where proceedings had been taken on a bill, it has been held sufficient *prima facie* evidence that the party was the attorney to plt., that, when applied to to receive the money, he produced the bill, and gave a receipt for the money as plt.'s attorney: *Owen v. Barrow*, 1 N. R. 102-3. To prove the agent's authority, it is not necessary to call him; it may be by any other persons who know the fact: 1 N. R. 102-3, or who have seen such persons usually acting in such capacity, as by proving that the party had been in the habit of signing receipts for the principal: *Watkins v. Vince*, 2 Stark. 368; *post*, "*Principal and Agent*."

*Proof of Payment in Money, or its Equivalent, in Discharge of the Debt.*] This must be established; if there was no payment in money, or its equivalent, the nature of the defence is more of accord and satisfaction than payment: *ante*, "*Accord and Satisfaction*." A transfer of credit by deft.'s bankers to plt.'s account, will sometimes amount to a payment, although no money actually passes: *ante*, 672; *Eyles v. Ellis*, 4 Bing. 112. Payment is sometimes made by a *bill, note or draft*, on a banker; in which case, if the person receiving the draft do not use due diligence to get it paid, the deft. will be discharged, but not otherwise, unless the plt. agreed to run all risks: *ante*, 28; Chit. B. 94, 287; *Read v. Hutch-*

*inson*, 3 Camp. 352; 2 Show. 296; 2 Ld. Raym. 930. A bill or note, 7 T. R. 64, 5 M. & S. 62, or banker's check, 2 D. & R. 25, are not money. The delivery of an overdue bill of the vendor, in payment for goods sold by him, has, in one instance, been deemed as complete payment as where the debt, who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by the vendor, which had been due and dishonoured before the goods were ordered, &c.: *Mayer v. Nias*, 1 Bing. 311. [If the vendor alter a bill or note sent to him in payment, so as to vitiate it, he makes it his own, and cannot therefore recover from the vendee for the goods sold. *Alderson v. Langdale*, 3 B. & Adol. 660.]

Where a creditor directs his debtor to remit by the post, and it is lost, the creditor must bear the loss, and it will only be necessary for the party to prove the order, and that it was remitted accordingly, *Warwick v. Noakes*, Pea. Rep. 67, 3 B. & B. 295; but it is not sufficient to deliver letters with money in them to a bellman in the street: it must be to the Post Office, or one of the regular receiving-houses, *ib.* 186: and the sending bank notes uncut, would be insufficient, as the more prudent and usual method is to send them by halves: Pea. Ev. 289. And, where notes were sent half by the coach and half by the post, though the circumstance of one set of halves being sent by the coach caused their arrival in London two hours later, *per Abbott, C. J.*, "that being a reasonable precaution, the plt. had a right to send them by that conveyance; it is different as to a bill of exchange, payable to order; it may be specially indorsed, and no risk incurred by sending it by the post; but here it would not have been safe to have transmitted notes payable to the bearer on demand by that conveyance:" *Williams v. Smith*, 2 B. & A. 501. Where no directions have been given about the mode of remittance, still this being done in the usual way (per post) of transacting business of this nature, I should have held the debt. discharged: *Warwick v. Noakes*, Pea. Rep. 67-8, 186. And in *Walter v. Haymes*, R. & M. 149, *Abbott, C. J.*, said, "Where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the Post Office, this is equivalent to proof of a delivery into the hands of that person, because it is a safe and reasonable presumption that [716\*] it reaches its destination; but a letter directed to Mr. \*Haynes, Bristol, containing notice of the dishonour of a bill, is too general, and therefore insufficient."

If a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the latter, instead of taking payment in money, takes it in any other way, he does so at his peril: *per Bayley, J., Smith v. Ferrand*, 7 B. & C. 24; R. & M. 407, *Taylor v. Briggs*. So, if a debtor refer a creditor to a third person for payment, and the creditor gives that third person indulgence, without the knowledge and consent of the debtor, and the third person becomes insolvent, the loss must fall on the creditor, because, as between himself and the debtor, the giving the indulgence without notice operates as an agreement on his part to look to the third person, and discharge the debtor: *ib.*; see, also, cases cited Chit. Bills, 98, 288. And, where an agent gives his security, which is accepted by the creditor, who thereupon gives him the receipt, and the debtor in consequence deals differently with the agent, it will operate as a payment by the debtor: *Wyatt v. Marquis of Hert-*

*ford*, 3 East, 147. If banker's notes be paid into another banking-house, having transactions with the former, who, by the course of dealing, and with the consent of the latter, give credit for, instead of giving cash for the notes, and fail, the latter must bear the loss: *Gillard v. Wise*, 3 B. & C. 134; 7 D. & R. 523. If money be paid into a banking-house, to be placed to the credit of another, upon a condition, the money in the meantime to stand in the banker's books in the name of the party paying it in, it is at his risk, and the loss is his, if the bankers fail before the condition is complied with, though the other party had written to desire it to be paid in generally: 1 Coop, Eq. Ca. 148; Chit. B. 28, a.

The set-off of one sum of money against another, upon a balance of account, amounts to a payment: 2 P. W. 128. A debt will be sometimes discharged by a legacy left the debtor from the creditor; but a negotiable bill of exchange is not to be considered as paid or satisfied, by the drawer's bequeathing a larger legacy to the party in whose favour it was drawn, although such party continued to be holder at the time of the testator's death: 3 Ves. 561; 2 Roper, 20. But, in another case, it was held that a debt on a note was discharged by an entry in the testator's hand, that the debtor should pay no interest, nor should he, the testator, take the principal, unless greatly distressed, it being proved the testator died in affluent circumstances: 5 Ves. 350.

The payment must be proved to have been made and received *in discharge of the debt*, and so as to extinguish it: "therefore, a payment of part is no discharge of the whole debt, though expressed to be in full of all demands. There must be some consideration for the relinquishment of the residue, and some benefit, or the possibility of benefit, to the party relinquishing his further claim; otherwise, the agreement is *nudum pactum*:" *per Ld. Ellenb. Filch v. Sutton*, 5 East, 231; 1 Chit. Rep. 390. However, as observed by *Holroyd, J.*, 2 B. & C. 481, "An agreement between a debtor and creditor, that part of a larger sum should be paid by the debtor, and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole; but then the legal effect of such an agreement might be considered to be the same as if the whole debt had been paid, and part had been returned as a gift to the party paying." And a payment of part before the stipulated day or by a third person, would be sufficient: *ib.*; *Lewis v. Jones*, 4 B. & C. 506; 6 D. & R. 576, *s. c.* The appropriation of a payment, where there are several distinct debts, is often accompanied with difficulty; the general rule is, that the party who pays money has a right to apply that payment as he thinks fit; if he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money, and he would have a right to make the application at a subsequent period: *Simson v. Ingham*, 2 B. & C. 72-4. But, where the accounts are \*treated as one entire account by all parties, this [\*717] rule does not apply: *Bodenham v. Purchas*, 2 B. & A. 45. But if, at the time the debtor makes the payment, he declare that it is made in discharge, or part-payment, of either of the debts, or the circumstances raise an inference that such was his intention, the creditor is thereby prevented from applying it to any other demand: *ib.*; 14 East, 239, 243, *n. (a.)*; Cro. El. 68; 5 Taunt. 596; 1 Marsh. 242, and other cases introduced; 1 Pea. Ev. 251. These rules hold, whether the debts be created by specialty, or due on simple contract: *ib.*; *Plomer v. Long*, 1 Stark. 1534, (*a.*);

2 M. & S. 18; 1 Marsh 238. It has been decided, that though one debt be a pure equitable demand, still, if there be no appropriation by the debtor, the creditor may appropriate a payment to such claim, and sue for another subsisting legal debt, *Bosanquet v. Wray*, 6 Taunt. 597; but see *Birch v. Tebbutt*, 2 Stark. 76; and, though one debt be contracted by the debt.'s wife *dum sola*, and the other by the debt., the creditor may appropriate the payment to either: *Goddard v. Cox*, Str. 1194. But, where old debts as well as new ones are subsisting, but security has been given for such new debts, and payments are made to the exact amount of the new ones, it will be presumed, in favour of the surety, that such payments were made in respect of the latter account: *Marryatts v. White*, 2 Stark. 102; *Williams v. Rawlinson*, 3 Bing. 75. The circumstances of the case will sometimes infer a special application, though not expressed at the time: *per Ld. Ellenb.*, *Newmarsh v. Clay*, 14 East, 244, *Shaw v. Picton*, 4 B. & C. 7, 15; as, where there are two accounts, one with the debtor in his own right, the other as executor, the law will apply the payment to the former, *Goddard v. Cox*, Str. 1194; and where there are several demands, one of which is illegal, it will be presumed that the payment was made on those which are legal: 1 B. & P. 264; *Wright v. Laing*, 3 B. & C. 165. Where a party owes a debt contracted whilst he was a trader within the bankrupt laws, and one accruing subsequently, a general payment will be applied to the first demand, to prevent the creditor issuing a commission of bankruptcy: *Plomer v. Long*, 1 Stark. 154-5; 1 Ld. Raym. 286; Pea. Rep. 64. When a debtor makes a payment generally, without directing the appropriation, it shall be taken to be a payment on account of the subsisting debt, and on no other: 2 Esp. Rep. 605. But, where *A.*, having a legal claim against *B.* on bills of exchange accepted by *B.*, and having also possession of a deed of mortgage, executed by *B.* to a third person, of which he might compel an assignment in equity, and payment was made *on account* generally, *Ld. Ellenb.* said, "I cannot go beyond the terms of the receipt; on account *there* means an account on which debt. was liable, but he was liable on the bills only: *Birch v. Ferbutt*, 2 Stark. 76; 6 Taunt. 597; *contra, ante*. And, therefore, where *A.*, having large demands against *B.*, upon bill transactions with himself, and also as agent for several persons to whom *B.* had granted annuities, secured by *C.*, caused an attorney to make application to *B.* and *C.* on behalf of these annuities, and *B.*, in consequence of that application, and the remonstrances of *C.*, the surety, paid to *A.* certain sums of money, without making any specific appropriation of them at the time of payment, it was held, that *A.* must be considered as having received them on account of the annuitants, and that the latter were entitled to have these moneys divided amongst them, in proportion to the amount of their respective demands: *Shaw v. Howard & another*, 4 B. & C. 715. But, where accounts are blended, and treated as one entire account by the parties, as where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt, *Simson v. Ingham*, 2 B. & C. 72; 1 Meriv. 604; *Williams v. Rawlinson*, 3 Bing. 75; 2 B. & C. 703. Where bankers receive a check from the plt. without [\*718] objecting, they are bound, as his agent, to \*apply, in payment

of it, the first moneys they receive from the drawer not specifically appropriated by him, in preference to a check subsequently presented, and also from a balance due from the drawer to themselves: *Kilsby v. Williams*, 5 B. & A. 821. But, where plt. directed his bankers to hold money from his private account, at the disposal of *J. M.*, but plt. revoked his order after it was presented, but before it was paid, yet the bankers paid the money, it was held that they had no right to pay it, as no appropriation had been made: *Gibson v. Minet*, 2 Bing. 9.

*Mode of proving Payment.*] This must be done by witnesses present on the occasion of the payment. If a receipt, or other memorandum, showing the payment, can be produced, it should be proved as written documents in general: *post*, "*Secondary Evidence*," and as to the mode of proof by receipt, see *post*, "*Receipt*." Such receipt is not conclusive, though very strong evidence of the payment: 2 T. R. 366. A deed, reciting the actual payment of money, is conclusive at law, that the payment was made, especially if a receipt be indorsed on the deed; but it would not be so if, from the whole tenor of the deed, it appears no such payment was made: *Rountree v. Jacob*, 2 Taunt. 141; *Lambourne v. Cork*, 1 D. & R. 211; 5 B. & A. 606; *ante*, 43.

Payment may be presumed from lapse of time, or other circumstances: 2 Stark. 97. Thus, a bond is presumed to be paid after twenty years, unless the contrary be expressly proved, 6 Mod. 22, 11 *ib.* 2, Str. 652, P. Wms. 325, 1 T. R. 270; and, in some cases, even in a shorter time: *ib.*; 1 Camp. 27; see Stark. 9. And also in cases of simple contract debts: *Cooper v. Turner*, 2 Stark. 498. Thus, after a lapse of eight or nine years, from 1806 to about 1814; Dallas, C. J., said, "Though there was strong evidence to show that money had actually been advanced, in 1806, yet it was for the jury to consider whether, after so great a lapse of time, the debt had not been satisfied:" see, also, 5 Esp. Rep. 52, 1 Taunt. 572; but see 1 D. & R. 16, and *ante*, 47-8. When twenty years have elapsed since the date of a note, &c., payment will be presumed, unless the contrary appear: *Duffield v. Creed*, 5 Esp. Rep. 286. Other circumstances will also raise a presumption of payment;—thus, a receipt for the latter items of an account is presumptive of the former having been paid: 2 Stark. 474; Gilb. Ev. 142; Pea. Rep. 30. A receipt for rent due on a certain day is strong evidence of payment of former rents: Gilb. Ev. 142. In some cases, the possession of bills and securities for money is presumptive evidence of payment; thus, in an action by the indorser against one of the makers of a joint and several promissory note, where the defence was payments to the payer: *Ld. Ellenb.* said, "Where there is a competition of evidence on the question, whether 'a security has or has not been satisfied by payment,' the possession of the uncanceled security by the claimant ought to turn the scale in his favour, since in the ordinary course of dealing, the security is given up to the party who pays it:" *Brembridge v. Osborne*, 1 Stark. 372. In an action by the drawer against the acceptor of a bill, if the plt. produce the bill, and with a receipt on the back of it, as paid to a person who was at that time the holder, *per Ld. Kenyon*, "*prima facie*, the receipt imports that it was paid by the acceptor, and not by the plt.:" Pea. Rep. 35. And, as it is the ordinary course of dealing to give up or destroy securities to the party who pays the possession of such securities is presumption that the security has been satisfied by

payment: 1 Stark. C. 374. When bills are taken in payment of a debt, and the party sues upon the original consideration, payment of the bills will be presumed, unless the plt. show the contrary: *Hebden v. Hartsink*, 4 Esp. Rep. 46; *ante*, 28. Payment may also be presumed from the usual course of dealing adopted by the parties: thus, where, in an action on a demand, there is proof that plt., and other workmen came regularly to receive their wages from deft., whose practice it was to pay [\*719] his workmen every week: \*1 Esp. Rep. 196; 3 Camp. 10. But in an action for money lent by a person who had accepted for the accommodation of the drawer, the production of the bill is not even *prima facie* evidence that he has paid it, without proof that it has been in circulation since it was accepted, and payment is not to be presumed from the appearance of a receipt indorsed on the bill, unless the receipt is shown to be in the handwriting of the deft., or some other person entitled to demand payment: *per Ld. Ellenb.*, 2 Camp. 439. It is proof of payment of money, if the payer produce a check drawn by him in favour of the payee, and indorsed by the latter: 3 Esp. Rep. 196. But the mere proof of the delivery and payment of a check, in an action for money had and received, is not sufficient evidence of a debt due from the person to whom it is delivered and paid, unless it be shown that the plt. received money thereon: Gow. 15; 4 Esp. 9; 4 Taunt. 293.

PAYMENT OF MONEY INTO COURT, *ante*, 680, "*Money, Payment of into Court.*"—PEDIGREE, *ante*, 457.—PENAL ACTION, *post*, "*Statute.*"—PEDIGREE, *ante*, 149.—PERJURY, *post*, "*Witness.*"—PETITIONING CREDITOR, *ante*, 211.

## PLEAS IN BAR.

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NATURE OF, IN GENERAL.] Pleas in *bar* ought to show that plt. has no cause of action; they state the various defences of which, under the circumstances of each particular case, the deft. may avail himself, in a suit at law. Whatever is mere matter of defence in equity, 7 East, 153, 8 *ib.* 344, or is founded on the practice of the court, is not, in general, pleadable: 2 East, 442. These pleas either deny that the plt. ever had the cause of action complained of, or they admit that he once had the cause of action, but insist that it no longer exists. And they may consist of:

1, the general issue; 2, a denial of a particular allegation; and, 3, a special plea of new matter not apparent on the face of the declaration.

General issues are the appropriate pleas fixed by ancient usage, when it is intended to traverse or deny the whole of the facts alleged in the declaration, Steph. Pl. 172, and are proper, and in general necessary, when the defence merely denies the plt.'s allegation, and refers the matter in dispute to the jury, who are the proper judges whether or not the fact complained of was committed: Gilb. C. P. 63. However, it was usual at one time, even in assumpsit, for the deft. to deny a particular allegation in the declaration, instead of pleading the general issue, which denies the \*whole: Gilb. C. P. 60-1. But this practice no [\*720] longer exists in assumpsit; though, in debt for rent due by deed, the deft. may still plead *non est factum*, or nothing in arrear: or, if not by deed, *non dimisit*, or nothing in arrear, though they may be given in evidence under the plea of *nil debet*: Gilb. C. P. 61-2. In all personal actions, the deft. was at liberty to show specially, to the court, matters of defence, not merely consisting in a denial of a material part of the plt.'s declaration, but introductory of matter not apparent therein: *ib.* 62, 66.

**GENERAL RULES as to Pleading the General Issue, or a Special Plea.]** Any matter of defence which denies what the plt. would, on the general issue, be bound to prove in the first instance, in support of his action, should be given in evidence under that plea, 4 Mod. 405, 1 Ld. Raym. 38; but any ground of defence, which admits the facts alleged in the declaration, but avoids the action by matter which the plt. would not be bound to prove or dispute in the first instance, on the general issue, may be pleaded specially: 1 Ld. Raym. 88-9; Bac. Ab. *Pleas*, G. 3.

Where the defence consists of *matter of fact*, which amounts to a denial of the allegation which the plt. is bound to prove in support of his declaration, the deft. must plead the general issue; or it would be a ground of special demurrer that the plea amounts to the general issue: Com. D. *Pl.*, E. 13, 14; Bac. *Pleas*, G. 3. But an entire plea is good, though to part of the declaration it amounts only to the general issue, 3 Lev. 40, and he may either plead it generally, or give it in evidence under the general issue: Com. D. *Pleader*, E. 14; Bac. Ab. *Pleas*, G. 3. And in all actions the deft. may plead any matter which shows why the action does not lie, and which, being matter of law, is proper to be shown in the court, Bac. Ab. *Pleas*, G. 3, as in assumpsit, infancy, payment, &c. In these cases, from the nature of the defence, the plt. has an implied colour of action; bad indeed, in point of law, if the facts pleaded be true, but which is properly referred to the decision of the court: Tidd, 600; 1 Chit. Pl. 444. In trespass to lands, if the deft. claim under a demise from the plt., express colour need not be given, 3 Salk. 273, though the unnecessary addition of colour appears to be no ground of demurrer, as the introduction of superfluous words of form will not vitiate: 1 East, 219. Where, from the nature of the defence, the plt. would have no implied colour of action, the defendant cannot plead specially any matter which controverts what the plt. would, on the general issue, be bound to prove, without giving express colour: 2 Saund. 401; 10 Co. 88, &c.; Cro. El. 76; 8 T. R. 403. As to the necessary qualities of express colour, see

1 Chit. Pl. 443; Steph. Pl. 225. It now so seldom occurs in practice, that it is not considered necessary to notice such qualities.

There are many cases in which it may be most expedient to plead specially, notwithstanding the defence may be available under the general issue, in order either to compel the plt., in his replication, to admit some of the facts stated in the plea, and thereby to narrow the defendant's evidence, or to compel the plt. to disclose his title, &c., and thereby narrow the ground on which he might rest his case on the trial: 1 Chit. Pl. 443. [Special pleas that amount to the general issue are bad, on demurrer. The following are examples of such pleas:—Where a special plea only sets up a contract incompatible with that stated in the declaration: *Morgan v. Pebrer*, 3 Bing. N. S. 457, and 4 Scott, 230. Where a special plea describes a contract with the plaintiff for goods bought of him (for which he brings an action of debt,) and a warranty by the plaintiff, and a payment by the defendant of the full value: *Dicken v. Neale*, 1 Mees. & W. 556; 1 Tyr. & Gr. 879. Or, in an action for services rendered, by an attorney, where the plea states that the defendant had derived no benefit from them, and that the plaintiff had advised the striking a docket and promised to indemnify the defendant: *Hill v. Allen*, 5 Dowl. P. C. 471. Or where the plea qualifies the contract stated in the declaration, and introduces a new stipulation into it (although the *actual* agreement between the parties:) *Nash v. Breeze*, 11 Mees. & W. 352. Or, where a plea sets up, in case for damage by negligence in conducting railway carriages, that the damage was occasioned by the negligence of both parties: *Armistage v. G. J. Railway Co.*, 6 Dowl. 340, 3 Mees. & W. 244. And, where in case for injury by the defendant's coach being driven against the plaintiff's carriage, the defendant pleaded specially that the plaintiff's carriage was driven by one of his sons in so unskilful a manner, that the collision happened thereby, and not through any negligence of the defendant's servant: *Gough v. Bryan*, 2 Mees. & W. 770, and 5 Dowl. P. C. 765. In such and similar cases the pleas have been held bad, as amounting to the general issue. The new rules of pleading, however, in the English Courts, have much circumscribed the kinds of evidence that may be offered under the general issue.]

GENERAL QUALITIES OF PLEAS IN BAR.] Every plea in bar must be adapted to the nature of the action, and conformable to the count: Co. Lit. 303, a. 285, b.; Bac. Ab. *Pleas*, 1. If the deft. plead a plea not adapted to the nature of the action, the plt. may treat it as a nullity, and sign judgment, or demur, though it would be aided by verdict: 2 Str. 1022; Bac. Ab. *Pleas*, I. 1; see Steph. 1; Arch. Pl. 136; Steph. Pl. 222. In general, where the deft. pleads an improper plea, the safer course is to demur, or move the court to set it aside: 1 Burr. 59; 2 T. R. 390; 7 T. R. 530; 5 T. R. 152. The plea must not only be adapted to the nature of the action, but also be conformable to the count: thus, in debt [\*721] *qui tam*, "a plea that the deft. doth not owe to the plt. alone, is insufficient, though, if it had been *nil debet* generally, it would have sufficed: Hob. 327-8, Reg. Plac. 302; Bac. Ab. *Action, qui tam D.*, n. c.; and see 2 Str. 919; 2 Saund. 69, a. And it is a rule, that if to a transitory action the deft. plead any matter which is itself transitory, *he is obliged to lay it at the place mentioned in the declaration*, 1 Saund. 247, n. 1, 8 a., n. 2, 85, n. 1, 2 Saund. 5, n. 3. Com. D. Pl. E. 4, C. 20;



but, if the justification be local, the deft. must plead it in the county or parish where the matter arose, and conclude with a traverse of having been guilty elsewhere: *ib.* So, when the time is not material, it is a rule that the plea should follow the day in the declaration, and, if it be material to vary from it, the plea should conclude with a traverse: 1 Saund. 14; Com. D. *Pl. E.* 4. Where, however, there is no ground to intend the contrary, the plea will be considered as conformable to the count: 1 Lev. 184; 1 Chit. *Pl.* 509.

The plea must answer all that it assumes in the introductory part to answer, and no more: Com. D. *Pl. E.* 1, 36; 1 Saund. 28, *n.* 1, 2, 3; 3 B. & P. 174; Steph. *Pl.* 232. Where a plea begins only as an answer to part, and is in truth but an answer to part, the plt. cannot demur, but must take his judgment for the part unanswered, as by *nil dicit*; and, if he demur, or plead over, the whole action is discontinued; *ib.*; Willes, 480; 1 H. Bl. 645; 1 B. & P. 411; 2 East. 38. So, if the plea profess to answer only a part, but afterwards answers more, it has been held that the plt. should not demur, but should take his judgment for the part not mentioned in the beginning of the plea: 1 Str. 303; 1 Saund. 28, *n.* 3; Steph. *Pl.* 232. But, if a plea profess, in its commencement, to answer more than it afterwards answers, the whole plea is bad, and the plt. may demur: 1 Saund. 29, *n.* 1, 2, 3, 296, *n.* 1. But, in this case, the part of the declaration which is professed to be, but is not, answered by the plea, must be material and the gist of the action; for, where any thing is inserted in the declaration, merely as matter of aggravation, the plea need not answer or justify that, and the answering the matter which is the gist of the action will suffice: 1 Saund. 28, *n.* 3; 3 T. R. 297; Com. D. *Pl. E.* 1. A general charge ought to be answered in every part, but it is said to be sufficient to answer a collateral issue in the words of the plt.: 3 B. & P. 348; Com. D. *Pl. G.* 15; 1 Chit. *Pl.* 455.

Every special plea of justification states circumstances which either excuse the fact complained of, or show it to be lawful; it must, therefore, admit or confess such fact; otherwise it is not a justification, but a denial of the fact; and amounts to the general issue: 3 T. R. 298; 1 Saund. 28, *n.*; Salk. 367; 1 Ld. Raym. 38; 3 Wils. 411.

The plea must, in general, be single; and, if it contain two matters, either of which would bar the action and require several answers, it will, in general, be subject to special demurrer for duplicity. But the deft. is not precluded from introducing several matters into his plea, if they be constituent parts of the same entire defence, and from one connected proposition, 2 W. Bl. R. 1022, 1028, 1 Burr. 316, 318, or be alleged as inducement to, or as a consequence of, another fact: Com. D. *Pl. E.* 2. And, at common law, the defendant may plead to a part of the declaration one ground of defence, and to another part a different ground, Bac. Ab. *Pl. K.* 1, Co. Lit. 304, *a.*; and this, in inferior courts not of record, is the only course to be adopted: see the form, 1 Saund. 296. The rule that a plea must be single also precludes the deft. from pleading and demurring to the same fact, the duplicity in which case would draw the matter to a different inquiry, the demurrer to be tried by the court, and the fact by a jury. Duplicity must be objected to by special demurrer, and the particular duplicity must be distinctly pointed out, 1 Saund. 337, *n.* 3, Doc. Plac. 147, Bac. Ab. *Pl. K.* 1, Com. D. *Pl. E.* 2, 1 B. & B. 415-6; and, if

the plt. do not demur, he must reply to both material parts of the plea : 1 Vent. 272 ; 1 Chit. Pl. 457.

\*The plea must be also certain : Com. D. *Pl. E.* 5 ; C. 41, *E.* [\*722] *per totum*. The certainty, to a common intent, is sufficient, Com. D. *Pl. E.* 7, C. 17 ; 1 Saund. 49, n. 1, 343, n. 2. There are, however, instances in which a greater certainty is more necessary than others : 1 Saund. 276, 290 ; 1 Ld. Raym. 450 ; 2 Saund. 180, b. 297 ; 3 T. R. 763 ; 4 T. R. 719. In a declaration on a deed, whether in debt or covenant, it is sufficient to say *testatum existit* ; but, in pleas and avowries, the deed being the substance of the answer, the operation of the deed or instrument must be expressly averred, and not stated by way of recital or argument : 1 Saund. 274, n. 1 ; 1 Ld. Raym. 1599 ; Com. D. *Pl. E.* 3. The misstatement of certainty will be aided by verdict or general demurrer : *ib.* In some cases the law allows general pleading for avoiding prolixity and tediousness : Co. Lit. 303, b. ; Bac. Ab. *Pl. I.* 3 ; 3 T. R. 462 ; 1 B. & P. 640. If the deft. be bound to perform all the covenants of an indenture, if they be all in the affirmative, he may plead performance thereof generally, and is not obliged to exhibit to the court a performance of each of them, for this would overload the proceedings, when only one of the covenants might be in controversy between the parties, *ib.* ; but, if any be in the negative, the deft. must plead specially to each of them, and generally to the affirmative covenants : 8 T. R. 280. [A general averment of performance, "according to the provisions of the said agreement," is sufficient on general demurrer, although the agreement contains conditions precedent, and a specific averment of the performance would have been indispensable on special demurrer : *Varley v. Manton*, 2 M. & Scott, 484 ; 9 Bing. 363.] It is not essential to have the same certainty in pleading a matter which is only conveyance or matter of inducement as for matter in the negative : Com. D. *Pl. E.* 10, 11 ; 1 Saund. 346, n. 2.

The plea should be direct and positive, and not argumentative or by way of rehearsal or reasoning, which would create unnecessary prolixity : Com. D. *Pl. E.* 3. [See, also, *Hume v. Liversidge*, 1 C. & M. 332 ; 3 Tyr. 257.] An argumentative plea is aided after verdict, and upon a general demurrer : Com. D. *Pl. E.* 3 ; 2 Saund. 319, n. 6 ; 1 Chit. Pl. 461.

The plea should be so pleaded as to be capable of trial, and therefore must consist of matter of fact, the existence of which may be tried by a jury on an issue, or its sufficiency, as a defence, may be determined by the court upon demurrer ; or of matter of record, which is triable by the record itself, Co. Lit. 303, b. , Com. D. *Pl. E.* 34, 9 Co. 24, b. 25, a., 1 Chit. Pl. 462 : and if fact be improperly complicated with matter of law, so that it cannot be tried by the court or jury, the plea is bad : 2 Co. 25. Where the condition of a bond is, that deft. will show a sufficient discharge of an annuity, it is bad if he plead that he showed a sufficient discharge, as the jury cannot try whether it is sufficient, and should have been shown what discharge he gave, in order that the court might judge of its sufficiency, *ib.* ; but where the effect of the words represents a matter triable, it is sufficient, though it be not triable according to the precise words : 4 Mod. 249. A defect in this respect in a plea may be aided by the plt.'s taking issue upon a triable point ; but, if he should take issue upon an immaterial matter, it might be necessary to award a repleader : 1 Chit. Pl. 462.

If an entire plea be bad in part, it is insufficient for the whole: Com. D. *Pl. E.* 36; 3 T. R. 376; 3 B. & P. 174; 1 Saund. 337, *n.* 1. In assumpsit on several promises in different counts, if the deft. plead the Statute of Limitations to the whole, and it is a bad plea as to one of the counts, it will also be insufficient as to the residue: 1 Lev. 48; 1 Saund. 337, *b.* If several persons join in one plea, if it be bad for one, it is also bad for the others: 3 T. R. 377. The statement of several debts in a plea of set-off is an exception, and, if one of such debts be insufficient, the plt. cannot demur generally: 2 W. Bl. R. 910.

Where deft. alleged more than is requisite to introduce new matter, though repugnant and contradictory to what went before, in any point not material, it will not vitiate the pleadings, as *utile per inutile non vitiatur*; and such redundant or repugnant part may be rejected, especially after a verdict: Bac. Ab. *Pl.*, *I.* 4; Com. D. *Pl.*, *E.* 12; Co. Lit. 303, *b.*; 2 Saund. 305-6, *n.* 14; *ib.* 291; Hob. 208; *ante*, 721. It seems, however, that "a too precise or particular statement of material [\*723] matter may be taken advantage of upon the trial of a traverse thereof, but in general not by demurrer, as the objection does not appear upon the record, but depends upon the evidence, except where it is repugnant or contrary to matter preceding, Co. Lit. 303, *b.*; and though such repugnancy may not, in some cases, be aided by verdict, Bac. Ab. *Pleas I.* 4, yet, if it appear that a verdict was given on another part of the plea, the mistake will be cured: *ib.*; 1 Chit. *Pl.* 466.

[It is a general rule in pleading, that an equivocal expression in pleading shall be construed against the party using it; but if the other party pleads over, it shall be construed in that sense which will support the previous pleadings: *Hobson v. Middleton*, 9 D. & R. 249; 6 B. & C. 295.]

FORM AND PARTS OF PLEAS—*Title of Court.*] An omission as to the title of the court would not be material.

*Title of the Term.*] Pleas in bar may be, and usually are, entitled of the term of which they are pleaded, which is frequently subsequent to that of which the declaration is entitled, Bac. Ab. *Pleas, E.* 2, 2 Saund. 1, *f.* 2, *a. b. c. d.*; and, where matter of defence has arisen after the first day of the term, the plea should be entitled specially of a subsequent day: 1 Chit. *Pl.*

The names of the parties in the margin do not strictly constitute any part of the plea; 7 East, 383; 1 Chit. *Pl.* 468. As to how to describe deft. in the commencement, where he is misnamed, see *ante*, 12. After the names of the parties in the margin, the defts. appearance and defence are to be stated. \*The appearance may, in general, be stated to have been either in person or by attorney: Sayer, 217; see *ante*, "*Coverture*," "*Lunatic*," "*Infant*," "*Corporation*." The plea should also be in the name of an attorney of the proper court, Barnes, 259: but, though the appearance has been entered in the name of an agent to a country attorney, the plea may be in the name of the principal attorney, 2 B. & P. 111, Barnes, 239; it ought not, however, where there are several attorneys in partnership, to be in the name of the firm, but only in the name of one of them: 4 East, 195. In debt on a bond, if the deft. by his plea, deny the validity of the deed, or if an heir plead *rien per descent*, the deft. should say *onerari non debet*, and not *actio non*, 1 Saund. 290, *n.* 3 Ld. Raym.

217, 2 Salk. 516; and, in this case, the plea should describe the deed as a writing, or supposed writing obligatory, and should not admit that it is a deed: 1 Saund. 290, *n.* 3, 291, *n.* 1; Com. D. *Pl., E.* 27. When the matter of defence arose before the commencement of the suit, *actio non*, &c., is generally the proper commencement; but no matter of defence, arising after action brought, can properly be pleaded generally, but ought to be pleaded in bar of the further maintenance of the suit, 4 East, 502; and, if the matter of defence arise after issue joined, it must be pleaded *puis darrein continuance, ib.*; and, if it arise after trial, an *audita querela* is the only remedy. Where the plea is only to a part of the declaration, it must not cover the whole declaration, but must ascertain the part to which it is applied, or the plt. may demur: Com. D. *Pl., E.* 27; 1 Sid. 388; Lut. 241; 3 B. & P. 174; 1 Chit. Pl. 470.

The plea must have a proper conclusion, which is either to the country, or with a verification, and the latter is either of matter of fact, or of matter of record: Com. D. *Pl., E.* 28, &c.; Co. Lit. 303, *b.* But an avowry, or cognizance in replevin, need not have any conclusion: 1 Saund. 348, *n.* 7; 1 Chit. Pl. 474. When there is a complete issue between the parties, viz. a direct affirmative and negative, the plea should conclude to the country: 1 Saund. 103, *n.* 1, Com. D. *Pl., E.* 32; 2 Saund. 337, *n.* 1, 196. And this conclusion seems proper, although the plea necessarily contains a formal traverse, 1 Saund. 103, *b.*, Com. D. *Pl., E.* 33; and a plea in bar of *rien in arrear* to an avowry for rent, should so conclude, 1 Ld. Raym. 641; and this rule obtains, whether the affirmative be first in the pleading, and the negative subsequent, or *vice versa*: Carth. 88-9; Com. D. *Pl., E.* 32.

And, where a plea puts in matter of fact, as well as [\*724] \*matter of record, it should conclude to the country: Com. D.

*Pl., E.* 32. And, if a plea conclude with a special negative to the affirmative in the declaration, it should conclude to the country; 4 Esp. Rep. 255; Com. D. *Pl., E.* 32. But, where there is not a direct negative and affirmative, the plea need not so conclude: 2 Lev. 5; Com. D. *Pl., E.* 32. Whenever new matter is introduced on either side, the pleading must conclude with a verification or averment, in order that the other party may have an opportunity of answering it: 1 Saund. 103, *n.* 1; Com. D. *Pl., E.* 33. If matter of record be pleaded as a judgment recovered, for the same demand, &c., the plea should conclude with a *prout patet per recordum*, and a verification by the record, and, if several records be pleaded, they should be respectively verified, Com. D. *Pl., E.* 29; but if matter of fact, as well as matter of record, be put in issue, the trial may be by jury, and the plea may conclude to the country: Sayer, 208, 301; Hob. 244; Chit. Pl. 476. The usual prayer ought to correspond with, and be founded on, the premises in the plea; but a mistake in this respect, with the exception of pleas in abatement, *ante*, 4, will not vitiate, and the court will, *ex officio*, give judgment in favour of the deft., according to the substance of the plea, without reference to its conclusion: 4 East, 502, 509; 2 B. & P. 420; 2 Saund. 210, *d.* In pleading matter of estoppel, the deft., in the conclusion of his plea, should rely on it: Co. Lit. 303, *b.*; Com. D. *Pl., E.* 31, "*Estoppel*," *E.*; Dal. 68; 1 Saund. 325, *n.*; 4 Willes, 13. Since the statute 4 Anne, c. 6, s. 1, a wrong or defective conclusion, either to the country or with a verification, &c., can only be objected to as a ground of special demurrer: 2 Saund. 190, *n.* 5; Com. D. *Pl., E.* 29, 32, 33; 1 Chit. Pl. 477.

**SEVERAL PLEAS.]** By the 4 Anne, c. 16, s. 4 and 5, it is enacted, "that a defendant or tenant in any action or suit, or a plt. in replevin, in any court of record, may, with leave of the court, plead as many pleas as he may think necessary," with a proviso, that nothing in the act shall extend to any writ, bill, action, or information upon any penal statute. The liberty to plead several pleas is confined to courts of record; and, therefore, if, in the other courts of record, as the county court, the deft. plead two or more pleas, the plt. may demur for duplicity: 1 Chit. Pl. 478. And, in courts of record, the deft. cannot plead non assumpsit, 4 T. R. 194, or *non est factum*, 5 T. R. 95, to the whole declaration and a tender as to part; for one of these pleas goes to deny that the plt. ever had any cause of action, and the other partially admits it; and, in the common pleas, the deft. cannot plead non assumpsit, and the Stock-jobbing Act, 1 B. & P. 222, 1 M. & P. 146, or not assumpsit, and alien enemy: *ib. n. (a)*; 2 B. & P. 72. The king is not bound by this statute; and where he is plt., the deft. cannot plead double, without leave of the attorney-general: Willes, 533; Forrest's Rep. 57. But, with these exceptions, the deft. may, in different pleas, plead as many different grounds of defence as may be thought necessary, though they may appear to be contradictory or inconsistent: Com. D. Pl., E. 2; 1 Chit. Pl. 479. One plea cannot be taken advantage of to help or vitiate another, as every plea must stand or fall by itself, unless expressly referred to by an appropriate allegation: Willes, 380; 1 Chit. Pl. 480.

**PLEAS BY SEVERAL DEFENDANTS.]** Several defts. may join in the same plea or they may sever, and one deft. may plead in abatement, another in bar, and the other may demur, except in an action against husband and wife, when the husband must join in the plea with his wife: Com. D. Pleader, 2. Joint-tenants and co-parceners must join in an avowry, and a cognizance as a bailiff, should be for the entire rent, Bac. Ab. *Joint-Tenant*, K., 5 T. R. 246; but tenants in common must sever, and the avowry of each must be *de una medietate* of the whole rent, "and not of a certain sum, which amounts to a moiety: 1 Chit. [\*725] Pl. 481; *post*, "*Replevin*."

Personal defences, as coverture, infancy, &c., should be pleaded separately and one of several defendants may justify by command of another defendant, who pleads not guilty, or suffers judgment by default, for his act shall not take away the ground of defence from his servant: 2 Mod. 67.

Where two defts. join in a plea, which is sufficient for one, but not for the other, the plea is bad as to both, as it cannot be severed and said that one is guilty and the other not, when they all put themselves on the same terms: 1 Saund. 28, n. 2. If the defts. join in the plea, and it is in the singular number, it will be bad on demurrer: Lutw. 1531; Com. D. Pl. E. 35. In the same manner that a defective declaration may be aided at common law by the plea, or after verdict, so a defective plea may be aided in many cases by the replication or verdict; and the Statute of Jeofails, and that for the amendment of the law, also aid many mistakes after verdict or judgment: Com. D. Pl. E. 37, 38, 39; Vin. Ab. *tit. Replication*; 4 Anne, c. 16; 1 Saund. 228, a. n. 1.

*Precedents.*

## COMMENCEMENTS AND CONCLUSIONS OF PLEAS.

## COMMENCEMENT OF A FIRST PLEA, WHEN SPECIAL.

In the K. B., or C. P., or Excq.

Trinity Term, 9 Geo. 3.

*(Term which plea pleaded; when not, see ante, 723.)*

J. L. } And the said *(when improper, ante, 12)* deft., by E. F., his attorney, comes and  
 ats. } defends the wrong *(or, in trespass or ejectment, say, "force")* and injury, when,  
 T. L. } &c., and says that the said plt. ought not to have or maintain his aforesaid action  
 thereof against him, because he says, that, &c. *(Here state the matter of defence.)*

## THE LIKE WHERE THE DEFENCE AROSE AFTER THE COMMENCEMENT OF THE ACTION.

In the K. B., or C. P., or Excq.

Wednesday next, after three weeks of the Holy Trinity,  
 in Trinity Term, 9 Geo. 4 *(some day after matter of  
 defence arose.)*

R. D. } And the said deft., by E. F., his attorney, comes and defends the wrong, *(or, in*  
 ats. } *trespass or ejectment, say, "force")* and injury, when, &c., and says that the said  
 J. F. } plt. ought not further to have or maintain his aforesaid action thereof against him,  
 because he says that, &c.

## COMMENCEMENT OF A SECOND SPECIAL PLEA.

And, for a further plea in this behalf, the said deft., by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plt. ought not to have or maintain his aforesaid action thereof against him, because he says that, &c.

## THE LIKE TO A PARTICULAR COUNT, OR PARTICULAR TRESPASSES.

And, for a further plea in this behalf, as to the said first count of the said declaration *(or, if in covenant, "as to the said supposed breach of covenant first above assigned," or if in trespass, "as to the breaking and entering," &c., enumerating the particular trespasses mentioned in the declaration, and intended to be justified,)* the said deft., by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plt. ought not to have or maintain his aforesaid action thereof against him, because he says, that, &c.

## CONCLUSION TO THE COUNTRY.

And of this he, the said deft. puts himself upon the country, &amp;c.

## CONCLUSION WITH A VERIFICATION.

And this he, the said deft., is ready to verify; wherefore he prays judgment if the said plt. ought to have or maintain his aforesaid action thereof against him, &c.

## CONCLUSION WITH A VERIFICATION BY THE RECORD.

And this he, the said deft. is ready to verify by the said record; wherefore he prays judgment if the said plt. ought to have or maintain his aforesaid action thereof against him, &c.

\*PLENE ADMINISTRAVIT, *ante*, 507, 511, 512.—POLICY OF INSURANCE, *ante*, "Insurance."—POLL-BOOK, [\*726] *post*; "Public Documents."—POSSESSION, *post*, "Trespass."—POSTEA, *post*, "Verdict."—POST, *ante*, 297, 715.

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POWERS.

WHERE a party pleads an act done pursuant to a power, it must be shown that the power was strictly pursued in all its circumstances. And, if it be stated to have been executed in the presence of three credible witnesses, it must be shown who were the witnesses by name: *Com. D. Pojar, F. Arch.*; P. & E. 140. All the formalities and circumstances prescribed by a power must be strictly followed, however unessential and otherwise unimportant they may be, as they cannot be satisfied but by a strict and liberal performance. If a particular number of attesting witnesses be required, or if they are to attest in a particular form, there must be that number to attest, and they must pursue that particular form, and they must attest every thing requisite for the execution of the power: 1 Ph. Ev. 450; *Hawkins v. Kemp*, 3 East, 440. It has been held, that a certificate signed by two churchwardens and one overseer, but bearing only two seals, was not properly executed under the 8 & 9 W. 3, c. 30, which requires them to be under the hands and seals of the churchwardens and overseers, or the major part of them: *R. v. Anstrey*, 1 Phil. Ev. 453. And thus, where a power was to be executed "by any deed or writing under the hands and seals of the parties, to be by them duly executed in the presence of, and attested by two or more witnesses, and the attestation was only of the sealing and delivery, it was held, that the attestation was insufficient: *Wright v. Wakefield*, 4 Taunt. 214. However, by 54 G. 3, c. 168, this is remedied. And it has been held, that a power to be executed by an appointment, in the nature of a will, to be signed and published in the presence of, and attested by two or more credible witnesses, was not sufficiently executed by an attestation which noticed the signing only, and not the publication: *Moodie v. Reed & another*, 7 Taunt. 355. Thus, where the power was to be executed by any deed or writing under the hands and seals of the parties, to be by them duly executed in the presence of, and attested by two or more witnesses, it was held, that, as the attestation stated only a sealing and delivery, the power was not duly executed: *Doe v. Peach*, 2 M. & M. 576. And such a defect in the attestation cannot be remedied by a new attestation, indorsed on the instrument after the death of one of the parties: *ib.* Nor in such case, where the attestation is defective, can the defect be supplied by evidence. And, where there was a submission to arbitration, "so that the award be delivered under their hands and seals," it was made a question, whether an award sealed, but not signed, was a good award, the point reserved being, whether the sealing, which was virtually a signing, was sufficient, or whether the words of the submission should be intended, in common parlance, an actual writing of their hands. It was decided by the court that a virtual signing would not do, but that there ought to be an actual signing under their hands: *Thaire v. Thaire*, 1 Palm. 109; 1 Phil. Ev. 454.

[\*727]

## \*PRÆCIPE.

PRÆCIPE FOR A SPECIAL ORIGINAL IN ASSUMPSIT, CASE, &amp;c.

Middlesex (*venue in action*) to wit. If J. N. make you secure, &c., then put by gages, and safe pledges, J. S., late of the parish of C., in the county of D., maltster (*unless in cases of outlawry, the addition of place and abode seems now immaterial,*) that he be before us in eight days of Saint Hilary (*a general return-day,*) wheresoever we shall then be in England (*in C. P., "before our justices of the bench at Westminster," and not "wheresoever we," &c., to show for that whereas, &c., setting out precisely, as in a declaration, time, place, and other circumstances, which constitute the cause of action; and, after stating all the counts and the breach, conclude as follows:*) To the damage of the said J. N., of £—, as it is said, &c.

DECLARATION THEREON. THE LIKE WHERE ONE OF THE DEFTS. HAS BEEN OUTLAWED.

In the K. B. or C. P.

Trinity Term, 7 Geo. 4.

Middlesex, to wit. J. S. was attached to answer J. N. of a plea of trespass on the case upon promises; and thereupon the said J. N., by ———, his attorney, complains, for that whereas the said deft., (*stating cause of action, and, where there is another deft., who has been outlawed, "and one G. H., which said G. H., by due course of law, has been outlawed [or, if a woman, say, 'waived,'] at the suit of the said plt. in this plea and suit, and still remains so outlawed, on, &c., at, &c., were indebted," &c. After stating the promises and breach, conclude as in this form, merely stating, "that the said deft. and the said G. H. wholly refused, and the said deft. still refuses. (Conclude as follows:)* Wherefore the said plt. saith that he is injured, and hath sustained damage to the amount of £—; and therefore he brings his suit, &c. N. B. No pledges are to be added.

See form of præcipe and capias in covenant, *ante*, 394; and præcipe and capias in debt, *ante*, 407.

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PREScription.—*Ante*, 370; *post*, 728–9; *post*, "Way."

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## PRESUMPTIVE EVIDENCE.

PRESUMPTIONS in evidence are of two kinds: 1st, of Fact; and, 2dly, of Law.

1st. *Presumptions of Fact.*] The existence of one fact may be deduced from the known or assumed existence of another, with more or less certainty, in proportion as the experience of mankind has ascertained that these facts are uniformly or commonly connected with each other. Such presumption depends more upon the laws of nature than of society, and are, perhaps, better termed *circumstantial evidence*; yet in some instances a degree of technical force is given to such deductions, beyond their natural operation; see Stark. Ev. 1245. Although it is the peculiar province of the jury to deal with inferences of this class, yet in some instances, where the facts are necessarily connected according to the order of nature, the courts themselves will draw the conclusion: as, on a question of bastardy, where the child has been born within a few weeks after the access of the husband, bastardy will be inferred, without the aid of a



jury: *R. v. Luffe*, 8 East, 193. [So, in an action by the assignees of a bankrupt for goods sold, the defendant offered in evidence an account stated and settled, showing a balance due to the defendant, and which was dated prior to the bankruptcy; it was held, that it must be presumed to have been written at the time it bore date, and was properly received in evidence; if the fact were otherwise, or the paper a fraudulent contrivance, it was open for the plaintiff to, show it: *Sinclair v. Baggaley*, 4 Mees. & W. 312.

**\*2dly. Presumptions of Law.]** Those deductions from the [\*728] existence of a fact, to which any technical or legal effect is attached, beyond their natural operation, are termed presumptions of law. These are either conclusive, and may be made by the court, or inconclusive, and can only be found by a jury. Thus, that a bond, or other specialty was made upon a good consideration, is presumption to be made by the court, and cannot be rebutted by evidence, *Lowe v. Peers*, 4 Burr. 2225; but that a bond, after twenty years, without payment of interest, has been satisfied, or that a bill of exchange was accepted upon good consideration, are presumptions that may be rebutted by evidence, and must be found by the jury: see *Stark*. 1240. The former, therefore, are rather axioms of law than rules of evidence: the latter, or in conclusive presumptions, may be classed under the heads of—1, Presumption from lapse of time; 2, Presumption from possession; 3, Presumption of the continuance of relations; 4, Presumption of innocence.

**Presumption from Lapse of Time.]** A deed thirty years old is presumed to have been duly executed, if found in proper custody: *B. N. P.* 255. In case of an ancient recovery, accompanied with possession, it shall be presumed that the tenant to the *præcipe* was seized of the freehold: *Gilb. Ev.* 27. An endowment of a vicarage may be presumed from the long and continued possession of tithes and profits: 12 *Rep.* 4; and see *Wolley v. Browhill*, *McClel.* 332. Grants or acts of Parliament are presumed in many cases, after long-continued and adverse possession. Thus, a grant has been presumed, where lights had been adversely enjoyed upwards of twenty years: *Lewis v. Price*, 2 *Saund.* 175, (n.) Where a right of way had been adversely enjoyed above twenty years, though such grant must have been made within twenty-six years, all former ways having been at that period extinguished by an inclosure-act: *Campbell v. Wilson*, 3 *East* 294. So, where a way had been used for thirty years, though there had been an absolute extinguishment of the right a few years before by unity of possession, *Keymer v. Summers*, cited 3 *T. R.* 157; but the exercise of the right of way must have been with acquiescence of the tenant in fee, for tenant for life or years could grant nothing beyond the continuance of his particular estate, *Daniel v. North*, 11 *East*, 372, *Barker v. Richardson*, 4 *B. & A.* 579; yet, if the easement existed before the commencement of the particular estate, the presumption of a grant will not be so defeated: *Cross v. Lewis*, 2 *B. & C.* 686. Where deft. pleaded a right of way granted by a lost deed, and the plt. traversed the grant, and the Judge directed that, if the jury thought the right had been exercised for more than twenty years, by virtue of such deed, they should find for the deft., but, if they thought there had been no way granted by deed, they should find for the plt., this direction

was held right: *Lievelt v. Wilson*, 3 Bing. 115. Grants from the crown may, after great length of possession, as a hundred years, be presumed, not only between private parties, but even against the crown itself, if capable of making the grant: *R. v. Brown*, cited Cowp. 110; *Mayor of K. v. Hamer*, Camp. 102. Where a public footway over crown land was extinguished by an inclosure-act, but the public continued twenty years, after to use the way, such use is not evidence of a dedication of the way to the public, unless the crown's consent appear: *Harper v. Charlesworth*, 6 D. & R. 572; 4 B. & C. 574. The enfranchisement of a copyhold has been presumed, even against the crown, where a parliamentary survey, in 1649, charged it with sixpence as "freehold rent," and receipts had been since given for it under that name by the steward of the manor, and no other rent had been paid: *Rowe v. Ireland*, 11 East, 280. A possession of crown land, commencing by encroachment fifty-five years ago, is sufficient for a jury to presume a grant from the crown, and will support a demise in ejectment from the son and heir of such a possessor against a deft. whose possession began two years after the [\*729] father's death, and has \*continued seventeen years. But if the crown was not capable of making such a grant, no such presumption can be made: and even had the encroachment begun fifty years ago, the deft. should have a verdict; for the stat. 9 Geo. 3, c. 16, does not give the first possession or title, except by barring the remedy of the crown, after sixty years adverse and continued possession: and here the jury may presume that the possessions of both plt. and deft. were legally holden by the license of the crown: *Goodtitle v. Baldwin*, 11 East, 488. Twenty years' exclusive possession of a stream of water in any particular manner, alone affords presumption of right by a grant or act of Parliament; but less than twenty years may or may not afford such presumption, accordingly as it is followed with circumstances to support or rebut the right; *Bealey v. Shaw*, 6 East, 215. Where the owners of a fishery had landed their nets in another's ground for above twenty years, and occasionally repaired the landing-places, it should be left to the jury to presume a grant: *Gray v. Bond*, 2 B. & B. 667. So, likewise, to presume a license, where an enclosure from a waste, made twelve or fourteen years ago, had been from time to time seen by the steward without objection: *Doe v. Wilson*, 11 East, 56. But though the uninterrupted possession of a pew in a chancel, for thirty years, is presumptive evidence of a right by prescription, such presumption is rebutted by proof that the pew had no existence shortly before the thirty years, *Griffiths v. Mathews*, 5 T. R. 296; and where the origin of the possession is accounted for without the aid of a grant or conveyance, and is consistent with the fact of there having been none, it is a question for the jury whether, in fact, any was ever executed: *Doe v. Reed*, 5 B. & A. 232. If the owner of the soil throws open a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public: *R. v. Lloyd*, 1 Camp. 262; *Robert's v. Kerr*, 1 Camp. 262. (n.) It has been held, that six years' use is sufficient to found the presumption of dedication: *Trustees of Rugby Charity v. Merryweather*, 11 East, 376. If the land is in possession of a tenant, his dedication cannot bind the owner of the fee, *Wood v. Veal*, 5 B. & A. 454; but, after a long

time, and frequent change of tenants, the landlord will be presumed to have had notice, and to have concurred: *R. v. Barr*, 4 Camp. 16. Where a street, dedicated to the public, was terminated by the deft's fence, and thereby separated from his close, deft. was not justified in pulling down his fence, and entering the street at that end: *Woodyer v. Haddon*, 5 Taunt. 125. Twenty years will afford presumption that a bill or note has been satisfied, though the Stat. of Limitations be not pleaded: *Duffield v. Creed*, 5 Esp. Rep. 52. Payment of a bond is presumed after twenty years without demand, *Oswald v. Leigh*, 1 J. K. 270; and even within less time, if other circumstances, as a settlement of accounts, fortify the presumption: *ib.*: *Calset v. Budd*, 1 Camp. 27. Such presumption, however, may be rebutted by proof of an admission, or payment of interest, or that deft. has resided abroad the whole time, *Newman v. Newman*, 1 Stark. 101, or by indorsements on the bond within the twenty years: *Searle v. Ld. Barrington*, 2 Str. 826; *Rose v. Bryant*, 2 Camp. 322: and see 2 Ph. Ev. 137; 1 Stark. 310. But proof of deft.'s poverty will not rebut the presumption: *Willlaume v. Georges*, 1 Camp. 217. See, further, *ante*, 718.

*Presumption from Possession.*] Possession of land, or the receiving of its rents, is presumptive evidence of seisin in fee, and possession of chattels, property. But a recovery in trover for lead dug out of a mine, affords no evidence of plt.'s possession of the mine: B. N. P. 33. In trover for copper ore raised under and in the plt.'s land, it was held, that the presumption that the right to the minerals accompanied the fee simple of the land, might be rebutted, by the absence of the enjoyment of the minerals by \*the plt., and the use by others not owners of the [\*730] soil: *Rowe v. Grenfel*, 1 R. & M. 396. The presumption is, that a strip of land between the highway and the adjoining inclosure is, as well as the soil of the highway, *ad medium filum*, the property of the owner of the inclosure; but, if the strip communicate with open commons, or other larger portions of land, this presumption is either destroyed or considerably narrowed: *Grose v. West*, 7 Taunt. 39. The presumption is, that he who has a separate fishery is the owner of the soil: *Cooper v. Gibbs*, 3 Camp. 363.

*Presumption of Continuance.*] When the existence of a particular relation has been once proved, its continuance is presumed, till either the contrary be proved, or a contrary presumption arises from the very nature of the subject: Stark. Ev. 1252. A person once proved to have existed, is presumed to be still existing, to a certain time, 2 Rol. Rep. 461; but, after seven years, the presumption ceases. This period seems to have been adopted from the statutes 19 E. 2, c. 6, and 6 Anne, c. 18, relating to leases for life, *ante*; see *Doe v. Jesson*, 6 East 84; *Doe v. Deaken*, 4 B. & A. 433; see also *Doe v. Griffin*, 15 East, 293; and *Watson v. King*, 1 Stark. 121. So, where two or more have been proved to be partners, it is presumed that the partnership afterwards subsists, unless the contrary be shown: Stark. Ev. 1078, 1252. Upon an indictment for a libel against Ld. St. Vincent, as first lord of the admiralty, proof of his appointment by patent, previous to the publication, was held evidence that he was so at the time of publishing, and it lay upon the deft. to prove the appoint-

ment determined: *R. v. Budd*, 5 Esp. Rep. 230; *R. v. Tanner*, 1 Esp. Rep. 304. Proof that a person sailed in a ship for the West Indies two or three years ago, and that the ship has not since been heard of, is presumptive evidence of that person's death; but the time of the death must depend upon the circumstances of the case: *Walson v. King*, 1 Stark. 121.

*Presumption of Innocence.*] The law always presumes in favour of innocence, and that a man's character is good until the contrary be proved: Stark. Ev. 1248. Where a woman married again within twelve months after her husband had left the country, the presumption of innocence was held to preponderate over the usual presumption in favour of life: *R. v. Twining*, 2 B. & A. 386; and see *Williams v. The E. I. Comp.* 3 East, 192. So, the performance of every act, the omission of which would be criminal, will be presumed: *ib.*; and see *R. v. Inhabitants of Haslingfield*, 2 M. & S. 558. As, that the charterers of a ship gave notice to the captain of having put combustibles on board: 3 East, 192. That the plt., in an action to try his right to a donation, had subscribed the articles of the church: *Powell v. Milburn*, 3 Wils. 355: 2 W. Bl. R. 851. That plt. in a suit for tithes, had read the 39 articles, agreeably to the statute: *Monke v. Butler*, 1 Rol. Rep. 89; see other instances, *R. v. Hawkins*, 10 East, 211; Clayton's Rep. fol. 48, 1636; Comb, 202; B. N. P. 298: Comb, 57. But, where a criminal act has once been proved, the law infers malice, and the deft. must rebut this presumption: thus, every homicide is presumed to be murder, till the death be justified or excused: Fost. 256. And, if a man hold a market near the legal market of another, and on the same day, the former will be intended to be a nuisance: 2 Saund. 175. Under this head, also, may be classed the cases upon the presumption *omnia rite acta*. Thus, it will be presumed, that a man who has acted in a public office was duly appointed: *R. v. Verelat*, 3 Camp. 432. After proof of title, all collateral matters will be presumed in favour of right, as attornment upon a feoffment; 6 Co. 38; Cro. El. 401; Stark. Ev. 1250. So, also, that a recovery suffered by one who had that power, was done with all legal requisites: 2 Saund. 42. That the records of a court of [\*731] justice were correctly made: \**Read v. Jackson*, 1 East, 355.

That, when an order of bastardy purports to be made on the evidence of the mother, a married woman, and *other* evidence, such *other* was legal evidence: *R. v. Dedall*, And. 8. Upon the same principle it is that facts, without proof of which the verdict could not have been found; will be presumed after verdict, though not alleged, *Spiers v. Parker*, 1 T. R. 141; but the presumption, *omnia rite esse acta*, will require positive proof to support it, if any counter-presumption arise. Thus, in an indictment against a parish for not repairing a highway, where it was given in evidence that commissioners under an inclosure act had awarded, sixteen years ago, that the way was not within the parish, but it appeared that the parish had repaired it ever since, it was held that the usage raised a presumption that proper notices had not been given according to the libel: *R. v. Haslingfield*, 2 M. & S. 558.

## PRINCIPAL AND AGENT.

*As to Actions by and against Agents, see ante, "Agent."*

## I. ACTIONS BY PRINCIPAL AGAINST THIRD PERSONS.

**FORM OF REMEDY AND PLEADINGS.]** There is nothing peculiar relating to the form of remedy or pleadings in an action by a principal against third persons. As to the form of remedy and pleadings in an action by a principal against his agent, see *ante*, 62-3. A principal may always adopt the acts of his agent, and sue thereon, though he never appeared as the principal, 1 H. Bl. 81; 7 T. R. 359-60, 3 M. & S. 562; 2 Stark. 443, except in some cases, where there is an express contract, under seal, with the agent, to pay him, when the agent alone can sue: 1 M. & S. 575.

**EVIDENCE FOR PLAINTIFF.]** The plt. must prove the cause of action, as in other cases; and to prove that, that the party whose acts the plt. is adopting was his authorized agent.

**Proof of Agency.]** Where the third party professedly acts as the agent of the plt., such strict proof of authority is not required as where the interest of the plt. is concealed. It would suffice, in the former case, to prove the terms of the contract, or act done; but, in the latter, the agent's authority, either express or implied, must be established. Such authority may be vested in the agent, either by parol or by deed. If by parol, the agent himself, or some other party, should be subpoenaed to prove the appointment. \* If by deed, or other writing, then the same should be produced and proved: see *ante*, "*Deed*;" *post*, "*Secondary Evidence*." As to when an agent must be authorized by deed, see 3 Chit. Com. L. 195. Contracts made for the benefit of another, though without his actual privity or direction, may be rejected or affirmed at his election, though indeed some degree of agency, however slight, must always exist: Paley, 227; Co. Lit. 258; 2 Str. 859; 6 T. R. 176. Where the principal resides abroad, he is presumed to be utterly ignorant of the party with whom the factor deals; and, therefore, the whole credit is considered as subsisting between the contracting parties: 3 B. & P. 490.

It is a general rule, that all contracts entered into by a party, through the intervention of an agent, properly authorized, may be taken advantage of by him: Godb. 360; Paley, 225. Thus, a sale by a factor creates a contract between the owner and buyer; and this rule holds even in cases \*where the factor acts upon a *del credere* commission: [\*732] Str. 1182; 3 Chit. Com. L. 201. So, all the other acts of an agent enure to his benefit or disadvantage; thus, the demand of a debt by a known clerk of a creditor, is sufficient to constitute an act of bankruptcy by denial: Co. B. L. 79; 3 Chit. Com. L. 206. But, where a demand or notice, or other proceeding, conveyed and adopted by an agent, is intended to effect a third person with damages for non-compliance therewith, it is necessary to prove an express authority, given to the agent at the time he acted, and no subsequent sanction of the principal will give it effect, *Right v. Cutthell*, 5 East, 498; 3 Chit. Com. L. 206; therefore, where the debt. had tendered his debt, which the plaintiff refused to receive, and the plt. made a subsequent demand, through his agent, when

the deft. refused to pay it, on the ground that the agent could not show any express authority in writing or otherwise, it was held the plt. could not avail himself of such demand: *Coare v. Callaway*, 1 Esp. Rep. 115, 269; an agent, however, having a sufficient and express authority, need not, in such cases, produce the same, unless required so to do, *Roe v. Davis*, 7 East, 364; 3 Chit. Com. L. 206. A promise, representation, or admission made to an agent relative to any transaction in which an agent is engaged, and where it can be presumed to have been made to him in his character of agent, will enure to the plt.'s benefit: Godb. 360; B. N. P. 130; 3 Chit. Com. L. 207; *ante*, 648. The delivery of goods to an agent is a delivery to the principal: 3 T. R. 464; 7 T. R. 442; *ante*, 536.

**EVIDENCE FOR DEFENDANT.]** Besides rebutting the above proofs on the part of the plt., and establishing the ordinary defences which the deft. may avail himself of, he may show, in an action for goods sold, or the like, that the agent was a factor, and that deft. knew nothing of the plt., in which case deft. may avail himself of all defences he would have in an action brought by the agent; as, where a factor, acting under a *del credere*, or usual commission, sold goods as his own, and the buyer did not know that any principal existed, the buyer may, in an action brought by the principal, set off a debt due to him from the agent, *George v. Clagett*, 7 T. R. 359; 3 T. R. 454. As to brokers, see *Guerreiro v. Peile*, 3 B. & A. 616; *Baring v. Corrie*, 2 B. & A. 137; and see the 6 G. 4, c. 94. And, in general, if an agent do not disclose the name of his principal, and some prejudice arise to the buyer in consequence of such concealment, the principal cannot sue: 2 Stark. 443. It has been held, that the mere general knowledge of the seller being a factor, is not sufficient to deprive the buyer of the privilege of set-off, without express knowledge, before the contract was completed, that he acts as agent in that particular instance because a man who is in the habit of selling for others, may, nevertheless, sell his own goods: *Moore v. Clementson*, 2 Camp. 22. See further, *post*, 736, as to notice of the agency.

A payment made to an authorized agent, is payment to the plt., 7 Ves. 470, 14 Ves. 144; *ante*, 714; and payment to a factor in the course of his business, and without notice from the principal, in general discharges the debtor, if the usual mode of dealing warrants such payments: Cowp. 256; 2 Camp. 24. In the case of a payment, however, upon written securities, without deft. proving an express authority to receive it, it would not be sufficient, unless it be proved the party had the security: 1 Chan. Cas. 93; Bayley, 180; 3 Chit. Com. L. 207. In ordinary cases, the mere production of a bond, 1 Salk. 157, 2 Eq. Ca. Ab. 709, bill, or check, &c., is sufficient to warrant the payment to the person who produces it: 1 N. R. 103; Paley, 181; Chit. B. 7 ed. 281. But the presumption of authority from the possession of the instrument, may be repelled by evidence of its being obtained by fraud, or for some other special purpose than receiving payment, *ib.*: and proof by plt. of a notice on deft.

[\*733] not to pay the agent, would render a payment to the agent \*ineffective: Cowp. 251; B. N. P. 130. Proof of a subsequent recognition by the plt. of the correctness of the payment would suffice: 1 Eq. Ca. Ab. 145. As to tender to an agent, see *post*, "Tender." If a payment to an agent would suffice, so would a tender to him. The release, discharge, or composition, by an agent, of his principal's debts or

affairs, would bind the principal, provided it be done according to the agent's authority, and is warranted by the usual course of trade: 11 Mod. 71, 88; Chit. Com. L. 208. An agent, having an interest in goods, may submit to arbitration: 5 B. & C. 141. See further, *post*, 734-5, what acts of an agent are binding upon his principal.

COMPETENCY OF AGENT AS WITNESS, *post*.

## II. ACTIONS AGAINST PRINCIPAL BY THIRD PERSONS.

FORM OF REMEDY AND PLEADINGS.] These will be the same as in other cases.

EVIDENCE FOR PLAINTIFF.] The plt. must establish the cause of action, as in ordinary cases; and that the act, in respect of which the deft. is sought to be charged, was done by his agent, duly authorized.

*Proof of Agency.*] In actions against a party, where he is sought to be charged with the act of another, clear proof of the party's having authorised that act is essential. Proof that the authority was by parol will, in most cases suffice, Paley, 117, *ante*, 730; but an express authority, under seal, is necessary where an agent is appointed to execute a deed: 9 Co. R. 76; 9 Rol. Ab. 330; 2 Rol. Ab. R. *pl.* 3, 4; Hardw. 1 Str. 705, 955; 1 T. R. 181; 6 *ib.* 176-7; Com. D. *Attorney; Harrison v. Jackson*, 7 T. R. 209; Paley, 115. So, also, the agent of the corporation (where the agency concerns the interest or title of a corporation, as to let lands, or any matter in pais,) must be authorized by deed: Co. Lit. 94; 1 Salk. 191; *Rex v. Bigg*, 3 P. Wms. 423. So, also, wherever he acts under a power of attorney, in these cases the instrument must be produced and proved. Wherever also, the authority is shown to exist in writing, although it may not have been necessary that it should have been so conferred, the writing must be produced that it may appear whether the authority has been pursued: *Johnson v. Moore*, 1 Esp. 89. It is no objection that the agent is an infant, a married woman, attainted alien, outlawed, excommunicated, or otherwise incompetent to make contracts; for, however incompetent they may be as regards themselves, they are generally speaking, perfectly capable of doing so for others: Co. Lit. 52, *a*. Though it was held by Ld. Hardwicke, in one case, that a feme covert infant, by reason of her infancy, was unable to execute a power to dispose of real estate; *Herle v. Greenbank*, 3 Atk. 695. 1 Ves. 298, *s. c.*

An agent's authority is either *special* or *general*. If an agent is constituted one for a particular purpose, and under a limited and circumscribed power, he is a *special* agent, and cannot bind the act by any act exceeding the precise limits of his authority; but, if he be a *general* agent the principal is bound by all his acts. We shall, therefore, consider what act constitutes a party as special agent, and what a general one, and the principal liabilities under such agencies, &c.

First as to what constitutes a *special agent*, and the principal liabilities, under a power of attorney to demand and receive all moneys due to A., \*on any account whatsoever, and to use all means [\*734] for the recovery, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, and to transact other business, the latter words must be understood to refer, to the words preceding, as

meaning all business appertaining to the receipt of moneys, *Hillyear v. Finlayson*, 1 H. Bl. 155, 2 *ib.* 618; and, where the power was for receiving money, and concluded with the general words, "to transact all business," it was held, that the power to transact business did not authorize the agent to indorse the bill they had held under it: *Hay v. Goldsmidt*, 1 Taunt. 349. An authority to accept bills drawn by E. U. does not vest an authority to accept bills drawn by E. U.'s brother: *Nèale v. Tuslor*, 4 Bing. 151. If an agent has goods in his custody for some purpose, and is not authorized to sell, a sale by him, unauthorized by the principal, and not in market overt, and where the principal does not allow the agent to appear as principal, will not bind the principal, *Dyer v. Pearson*, 3 B. & C. 38; 4 D. & R. 684, *s. c.*; 15 East, 38. A factor employed to sell cannot pledge, 3 Chit. Com. L. 105, 6 M. & S. 1, 14, see G. 4, c. 94; or barter: 3 Chit. Com. L. 218, *n.* 8. If a master entrusts his servant to sell a horse, a warranty by the servant will not be binding on the master, *Helyear v. Hawke*, 5 Esp. Rep. 75, 3 *ib.* 65, 2 Camp. 555; and a special authority must be always strictly pursued, to render the principal liable: *Ambl.* 498: 6 T. R. 591; *Paley*, 145.

But an authority is to be so construed as to include all the necessary and usual means of executing it with effect: thus, it has been held, that a person signing his name on a blank stamped piece of paper, and delivering it to J. S., authorizes J. S. to insert any sum which the amount of the stamp will warrant: *Collis v. Emmett*, 1 H. Bl. 313. And, inasmuch as a power to do any act comprises a power to do all such subordinate acts as are incident to, or are necessary to effectuate the principal act in the best and most convenient manner, *ib.*, it is necessary, even in regard to a special agent, if it is intended to exclude from his authority any circumstance which it would otherwise fall within it, that it should be done by *express direction*: 2 Chit. Com. L. 200—1. An agent cannot delegate his authority to another so as to bind the principal by the act of the sub-agent; 3 Mer. 237; *Paley*, 128. When he would be bound by such sub-agent's acts, *post*, 736.

Secondly, as to what constitutes a *general* authority and the principal liabilities. This authority may be expressly or impliedly given. A general authority may be *implied* from the nature of the agent's employment, from the course of dealing between him and his principal, from the principal's prior conduct, or from his subsequent recognition of the agent's acts. It may be implied from the *nature of the employment*: thus, if a person puts goods into the custody of another, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them: *Bayley, J., Pickering v. Buck*, 15 East, 45. So, a factor or an auctioneer may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter, and there would be no safety in mercantile transactions if he could not: *s. c. Ld. Ellenb.* 43. So, also, a wife, with respect to contracts relating to necessities for her husband's family, is regarded as his general agent: 1 Sid. 109; *Bac. Ab. Baron & Feme*, H. 4 Burr. 2177; 2 Str. 1214, *n.* 1; 1 Camp. 191; 4 B. & A. 225; 3 B. & C. 631; 5 D. & R. 532. Where a person keeping livery-stables, and a horse-dealer, having a horse to sell, directed his servant not to warrant him, and the servant did, nevertheless, warrant him, still the master would be liable on the warranty, because the servant was acting within the gene-



ral scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between such master and servant: *Fenn v. Harrison*, 3 T. R. 757; 5 Esp. Rep. 75; \*1 Camp. [\*735] 43. n. The owner of a ship is bound by the representation of his broker, who put up the ship at the Royal Exchange and at the coffee-house, as a general ship, warranted to sail with convoy, and distributed handbills to the same effect: *Renguin v. Ditchel*, 3 Esp. Rep. 64. If an agent employed by the indorsees of a bill to get it discounted, warrant it to be a good one. his employers are bound by his act, and are liable to refund, if the bill be afterwards dishonoured by the acceptor, *Fenn v. Harrison*, 4 T. R. 177; otherwise, if the warranty was beyond the scope of the agent's authority, though acting *bona fide*, and with a view to the benefit of the principal: *ib.* For an agent employed generally to do an act, is only authorized to do it in the usual way of business; therefore, as stock is usually sold for money only, a principal is not bound by the acts of a broker employed by him, who sells it upon credit, without a special authority, though acting *bona fide*, and with a view to the benefit of the principal; and, if he have such a discretion, the principal is bound by his contracts, though they exceed the sum which he is ordered by the principal to give: *Hicks v. Hawkins*, 4 Esp. Rep. 114. And, although a person employed as a general agent, order goods in the name of his principal, which he converts to his own use, the principal, though he may have been wholly ignorant of the transaction, will be liable for them: *Gilman v. Robinson*, R. & M. 226.

This general authority may be implied, *from the course of dealing between the defendant and his agent, and from the principal's prior conduct*: as, if a servant has been allowed by his master frequently to purchase goods on credit, the master will be liable for what the servant purchases, though without express direction: Show. 95; 3 Rep. 625; 10 Mod. 111. So, if a servant, usually employed to pledge or borrow money, pledge his master's goods for money, the lender may sue the master for the money, 12 Mod. 564; and, where the master gave his servant money every Saturday to pay the expenses of the week, the servant purchasing the articles expended, and not having paid the money for several weeks together, though he received it regularly each week, the master was held liable: 3 Salk. 234: 1 Ld. Raym. 225; 2 Stark. 204. On the other hand, where the master is in the habit of paying ready money in advance for articles furnished in certain quantities to his family, if the tradesman deliver other goods of the same sort to the servant upon credit, without informing the master of it, the latter will not be liable, *Pearce v. Rogers*, 3 Esp. Rep. 214, 1 Show. 95; and where, from the nature of the case, an authority cannot be implied, and no express authority is given by the master, he is not liable, *Hiscox v. Greenwood*, 4 Esp. Rep. 174. It sometimes happens, that where the principal has furnished his agent with money, to pay for food to be purchased by the agent for him, the principal has the benefit and use of the goods, notwithstanding the agent's neglect to pay for them; here, indeed, notwithstanding the agent's departure from his authority, the principal will be *prima facie* liable, unless he can show that the credit was really given to the servant, or that he always gave the servant ready money to pay for the articles bought, and had not, therefore, ever authorized him to buy on credit, Bayley, 121; 5 Esp. Rep. 76; as to a wife's general authority, see *ante*, 574. A general authority to an agent

is supposed to continue until its determination is generally known; and, therefore, after the discharge of a clerk or agent, usually employed to draw, accept, or indorse bills, or the like, the employer will be bound by his signature or acts, though made after the determination of his authority, until the exchange be generally known: 12 Mod. 348; Chit. B. 26. When, therefore, the authority of such agent has been determined, or he has been discharged from his employ, and the plt. attempts to charge the deft. with an act done by such agent after that time, he should be prepared to prove deft. had notice of such determination of the authority, as by its being put into the gazette, or individually, if he was a former customer: *ante*, "Partners."

\*This general authority may be implied, or rather the deft. may [\*736] be rendered liable for an act of his agent, for which he was not previously, in strictness, liable, *by his recognizing and adopting such act* of the agent's; as, where an agent subscribes a policy, and, upon a loss happening, the principal pays, such payment is evidence of a general authority to the agent to subscribe policies, *Courteen v. Town*, 1 Camp. 43, and adjust them in case of loss: *Goodson v. Brooke*, 4 Camp. 163. And although his authority to subscribe policies be by power of attorney, yet if there be evidence of the principal's having recognized acts done in pursuance of it, it is not necessary to produce the power: *Neal v. Irving*, 1 Esp. Rep. 61; *Haughton v. Ewhank*, 4 Camp. 88. Where the usual course of management of the principal's concerns is carried on by a sub-agent, and recognized by the principal, he will sometimes be liable: *Bunb.* 266; 3 Mer. 237; Paley, 128. It seems that a small matter will be evidence of a subsequent assent, Paley, 124; and an adoption of the agency in one part, operates as an adoption of the whole act; for an act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder: *Stra.* 859; Paley, 125; 1 Barn. 77; 1 Atk. 128; 10 East, 378, 394.

Whether an agent has a general or special authority is properly matter of evidence for a jury, *Therold v. Smith*, 11 Mod. 88, Paley, 148; though it is the province of the court to decide on the effect of the terms of a deed, or other instrument, vesting the authority: 1 H. Bl. 313; 2 H. Bl. 218. In the construction of the extent of authority in mercantile agencies, regard must be paid to the usages of trade, and the evidence of mercantile persons may be consulted.

A principal is liable, civilly, for the neglect, fraud, deceit, or any other wrongful act of his agent, done by him in the course of his employment, and on behalf of the principal: see 12 Mod. 490, 1 Ld. Raym. 264, 1 Salk. 282; when not, 2 Stark. 377.

We have already seen what admissions and representations of an agent are binding on the principal: *ante*, 53. As to "Payment," "Release," "Tender," "Set-off," "Statute of Limitations," see those titles. A notice to an agent in the transaction, in which he is engaged for the principal, will charge the principal himself, because it is presumptive notice to him, 1 Ch. Ca. 38, 1 T. R. 16, 4 T. R. 66, 3 Meriv. 210; but notice, in order to affect the principal in respect to a contract concluded by the intervention of an agent, must be proved to have been to an agent empowered to treat, and not to one who is merely employed to carry proposals from one side to another: 1 Br. A. 351; 1 J. & W. 168; 4 Taunt. 873.

EVIDENCE FOR DEFENDANT.] The deft.'s evidence may consist in

endeavouring to rebut the plt.'s proofs in proving the injury or cause of action; and, besides the other usual defences the deft. may avail himself of, he may show that the plt., at the time of entering into the contract sued on, knew the deft. as the principal, and yet that the latter gave credit to the agent, with the agent's assent: 15 East, 62; 1 C. & P. 16; 3 Camp. 52; 5 Taunt. 356. Where a factor is employed to pay money for his principal to a third person, and the third person, instead of taking the money, takes only the security of the factor, without the knowledge of the principal, given to that factor a receipt as for the money due from the principal, in consequence of which the principal, unaware of the fact, deals differently with the factor, and is induced, in his accounts with the factor, to allow him as for money paid, in such case, if the security given by the factor with the third person prove invalid, the principal is nevertheless discharged: 3 East, 147; 8 T. R. 451; 2 C. & P. 581; 1 East, 565; *ante*, "Agent." Where the plt. seeks to bind the deft. for the act of an agent, which deft. never contemplated being liable for, he may show his discharge from liability by proving that the plt. had notice at the time of the act being done of the agent's want of authority \*to [\*737] bind the deft. to it, in which case no custom can be set up to contravene the effect of such notice: Peake Rep. 177. The fact of the plt.'s having had such notice must necessarily depend on the circumstances of the case: it may be collected from small matters: *Moore v. Clementson*, 2 Camp. 22; *ante*, 732. Circumstances which show collusion between the plt. and agent would be *prima facie* evidence of notice, *Escot v. Melhord*, 7 T. R. 361; and see *ante*, 712, as to notice after determination of agent's authority. See *ante*, 732, as to what acts of agent may enure to deft.'s benefit; and "Admissions," *ante*, 53.

COMPETENCY OF AGENT AS WITNESS.] Where a servant acts for his master in the common course of business, he is a competent witness for or against him, from the necessity of the case; Stark. Ev. 767; *Duel v. Harding*, 1 Str. 595; *Lewis v. Fogg*, 2 ib. 944; *Cock v. Wharton*, 2 ib. 1054; *Tullidge v. Wade*, 3 Wils. 18: *contra*, *Dunsley v. Westbourne*, 1 Str. 416. Such testimony has been deemed to be admissible, in a penal action against the master for selling coals without a bushel, *E. Ind. Comp. v. Gosling*, B. N. P. 289; or where money has been paid by the servant for his master, *Theobald v. Neggeth*, 10 Mod. 262; or where the son has received money for his father, and paid it over to the deft., 1 Salk. 289, B. N. P. 289; or where a porter has delivered goods for his employer, B. N. P. 289; or where a carrier has been employed to carry goods, though he was responsible to the consignor: Fort, 247. In an action against the captain for deserting a vessel, a mariner who was on board was held to be a competent witness to prove that there was a necessity for leaving the ship, although he had given a bond to the captain not to desert, *ib.*; but *semble* this would be evidence, without resorting to the exception from necessity. A journeyman is competent to prove the delivery of goods to his master: *Adams v. Davis*, 3 Esp. Rep. 48. So, where a clerk or servant has received money, he is a competent witness for the party who paid it, *Matthews v. Haydon*, 2 Esp. Rep. 509; and *per* *Ld. Kenyon*, *ib.*, it is the constant course, *ex necessitate*, to admit the evidence of clerks and porters, who were alone privy to the receipt of money, or the delivery of goods; thus, a bookkeeper is a good witness, without a release:

*Spencer v. Goulding*, Pea. Rep. 129. But, although an agent who executed the business of his principal is, in all cases, competent to prove that he acted according to the direction of his principal, yet, if the cause depend upon the question, whether the agent has been guilty of some tortious act, or some negligence in the course of executing the orders of the principal, and in respect of which he might be liable over to the principal, the agent is not competent, without a release: *De Symonds v. De La Cour*, 2 N. R. 374; *Rothero v. Elton*, Pea. Rep. 84; *Miller v. Falconer*, 1 Camp. 251; *Moorish v. Foote*, 2 Moo. 508; *Cuthbert v. Gourtling*, 3 Camp. 515; 4 T. R. 590. On proof of the sale of goods, the factor is competent to prove the contract, even where he is to receive a per centage for his commission: *Dixon v. Cooper*, 3 Wils. 307; *Loyd v. Archbottle*, 2 Taunt. 324. So, where the payee of a bill of exchange indorsed it in blank, and delivered it to an agent to procure acceptance, in an action of trover by payee against the drawer, the agent is a competent witness to prove that he left the bill with him for acceptance. In an action against the owner of a coach or vessel for the negligence of the coachman or pilot, the latter are not competent without a release: 4 T. R. 590; 2 Ld. Raym. 1007; Salk. 287. In an action against the sheriff for the misconduct of an officer, the latter is not competent without a release: *Jarvis v. Hayes*, Str. 1083. So, in an action against the New River Company, to recover for damages done to a house by the bursting of a pipe, after evidence that information had been given to a turncock, an agent of deft., as to the dangerous state of the pipe, which, had it been [\*738] attended to, would have prevented the mischief, it was \*held that the agent was incompetent as a witness to disprove the negligence: 4 T. R. 589; *Miller v. Falconer*, 1 Camp. 251; 15 East, 474, 3 Camp. 516; 2 Ld. Raym. 1007.

## PRIVATE DOCUMENTS OR WRITINGS.

As to evidence of private documents, they consist either in writings under seal, as deeds, wills, &c., which will be found under their respective heads, or in such as are not under seal, as bills, notes, books of account, &c.

By 7 Jac. 1, c. 12, the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done, above one year before the beginning of the action, except the tradesman or his executor shall have obtained a bill of debt, or obligation of the debtor, for his said debt, or shall have brought against him some action within a year next after the delivery of the wares, or the work done. And the second section provides, that nothing in the act shall extend to the mutual trading and merchandize between tradesman and tradesman. This act is said by *Ld. Hardwicke*, 2 Ves. 43, 376, to have been passed on account of an opinion then prevailing, that, after a certain time, a man's shop-books would be evidence for him after a year. But such books are not evidence even within the year, except under such particular circumstances as before stated; *ante*, 559 to 560: and see further, *post*, 748.

## PROBATE.

**EFFECT OF.]** A probate unrepealed is conclusive evidence, in civil cases, of the validity of a will of personal property, *Allen v. Dundas*, 3 T. R. 125, *ante*, 446, *post*, "*Wills*," and is the only legitimate evidence of personal property being vested in an executor, or of his appointment, and the original will is inadmissible for that purpose: *Coe v. Westernham*, S. N. P. 730. The probate is, however, no evidence to prove a devise of land: *post*, "*Wills*." Therefore, in ejectment, to prove the relation of father and son by the father's will, the will must be produced, *Gilb. Ev.* 72; but, though the probate is conclusive, and it will not be allowed the party to allege that the will proved is not the last will, &c. of the deceased, yet he may give evidence that the probate was forged, or that it was obtained by surprise: *Gilb. Ev.* 73-4. And, if the probate were granted by an inferior court, the adverse party may show that the testator had *bona notabilia*, for then the court had no jurisdiction: B. N. P. 247; *ante*, 504. An examined copy of the probate is evidence of the person there named being executor, as the probate is an original, taken by authority, and of a public nature: *Hoe v. Nathorp*, 3 Salk. 154: 1 *Ld. Raym.* 154, *s. c.* It is not necessary to prove the seal of the ecclesiastical court on the probate: *ante*, 446, 504. Where the first probate is lost, the court do not grant a second, but make out an exemplification from the record of their own court, which will be received in evidence: *Shepherd v. Shorthouse*, 1 Str. 412; B. N. P. 246; *Ph. Ev.* 377.

## PROCESS.—See WRIT.

## \*PROFERT AND OYER.

[\*739]

**WHEN NECESSARY to make Profert.]** In dealing upon a simple contract, no profert is ever made; but in pleading a deed it is usually necessary: *Com. D. Pleader*, O. 1, &c. But, when the deed operates under the Statute of Uses, a profert is unnecessary, 1 *Saund.* 9, *n.* 1, 8 T. R. 573, 2 B. & P. 387; nor is it so in the case of a feoffment, *ib.*, 1 *Saund.* 276; nor when the deed is stated only as inducement, 8 T. R. 573; nor where the plt. has no right to the possession of it, or the counterpart, 1 *Saund.* 9, *a. p.* 1, 1 *Ves.* 394; and the assignees of a bankrupt obligee need not make a profert of the bond: *Cro. Car.* 209.

When a profert, or an excuse for the omission, is unnecessary, the statement of it will be considered as surplusage, and will not entitle the deft. to oyer: 2 *Salk.* 497. Where a profert, or an excuse for the want of it, is necessary, if the plt. profess to produce the deed, when he is not prepared to do so, the deft. is entitled to oyer; and, if he plead *non est factum*, the plt. will be nonsuited on the trial, as it will not be sufficient in that case to prove the deed to have been lost or destroyed, or in the deft.'s possession: 4 *East*, 585; 1 *Esp. Rep.* 337. If there be any circumstances to excuse the profert, as that it has been lost or destroyed, or

in the possession of the deft., the same should be alleged. The omission of a profert when necessary, can only be taken advantage of on special demurrer: 4 and 5 Anne, c. 16; Com. D. *Pleader*, s. 17. [Where the excuse for not making profert of a deed only stated that it had been delivered to the plaintiff, not going on to state it then in his possession; held insufficient: *Wallis v. Harrison*, 4 Mees. & W. 538.]

WHEN OYER MAY BE CRAVED.] If the plt. necessarily make a profert of any deed, writing, &c., the deft. may pray oyer, which must be granted by the court: 2 Str. 1186; 3 T. R. 151. So, if the deft., in his plea, &c., make a necessary profert of any deed, &c., the plt. may crave oyer, &c.: Tidd, 8 ed. 635. Oyer cannot be craved if the deed be lost or destroyed, &c., and that fact be stated by plt.; nor can it be craved if a profert be unnecessarily made, 1 T. R. 149-50; though, if it be craved and given, he has a right to make use of it: Doug. 476; 1 Saund. 317, n. 2. Oyer is not demandable of a writ, T. R. 19 G. 3, 3 B. & P. 398-9; nor of a record, 1 Ld. Raym. 250; nor of a deed, &c., which is not presumed to have been brought into court, 1 Saund. 9, 10, n. 1; if however, oyer be improperly craved, and the writ, record, or deed, &c., be stated upon it, the defect in the plea will be aided on a general demurrer: *ib.*

PLEADINGS AS TO.] If, in the declaration, any part of a deed, &c., qualifying or rendering the deft.'s contract, &c., dissimilar to that stated, be omitted or misstated by the plt., the proper mode is for the deft. to pray oyer, and, after setting out the deed in *hæc verba*, to demur: 2 Saund. 366, n. 1. And, in pleading payment or performance of the condition of a bond, the deft. should set forth the condition, after craving oyer: 3 Keb. 708. But it is necessary, in an action on a bond or deed, conditioned for the performance of covenants in another deed, for the deft., in his plea of performance, to show such deed without craving oyer: 1 Saund. 10, n. 1; Com. D. *Pleader*, 2 W. 33; 1 Chit. Pl. 372.

Oyer having been granted, the deft. (unless in pleading performance of the condition of a bond,) may, in his plea, set forth the deed on oyer, or not, at his election; and he may afterwards plead *non est factum*, or any other plea, without stating the oyer: Str. 1241; 1 Wils. 97. If he do not set forth the indenture on oyer, it seems that he cannot plead, "that by the said indenture it was further agreed," &c.: 1 Saund. 317, n. 2. If the oyer be stated, the plea should, in strictness, be entitled of the same term as the declaration: 5 Co. 74, b.; 1 T. R. 149; \*2 Lutw. [\*740] 1644; 2 Saund. 2, n. 2. Where the plt. declares in vacation, before the essoign-day of the following term, it seems the plea may be entitled of a term subsequent to the declaration, with a *special* imparlance, or, which may be most advisable, may be entitled generally of the preceding term: 2 Wils. 411-12; 1 T. R. 278; 7 T. R. 447, n. d.; 2 Saund. 2, n. 2; Tidd, 8 ed. 936. If the deft. assume to set out the whole of the deed or condition, of a bond on oyer, the whole should be stated, with all recitals, *verbatim et literatim*; and if the deft. do not set forth the whole, or state it untruly, the plt. may sign judgment as for want of a plea, 4 T. R. 370; or may, by his replication, pray that the deed be enrolled, and set it forth and demur, for, by craving oyer, the deft. undertakes to set out the whole, Com. D. *Pleader*, P. 1; 1 Saund. 9, b., n. 1; but, in pleading to a bond conditioned for the performance of

covenants in another deed, distinct from that set out on oyer, it may perhaps, suffice to state the substance of the deed, and those covenants only which he has engaged to perform, averring that the indenture contains no other covenant on his part, 1 Saund. 9, 4 East, 344-5, 1 Saund. 317, *n. 2*; or perhaps even an allegation that the indenture contains no negative or disjunctive covenants, with an averment of general performance, would be sufficient, 4 East, 340, 344, *n. f.*; and the plt. might pray oyer, and set it forth, if untruly stated: 1 Saund. 9, *b., n. 1*; 317, *n. 2*; see, further, 1 Chit. Pl. 374.

When oyer is prayed of a bond and the condition, it is usual in practice not to set forth the bond, but to say, "and it is read to him," &c., and then to pray oyer of the condition, and set it forth in *hæc verba*; but the bond ought to be entered at large, as well as the condition, if the terms of the obligatory part be material to the defence, 1 Ld. Raym. 1135, *ante*, 415-6; the bond and condition are considered as distinct, the bond being complete without the condition, therefore, there may be oyer of one without the other: 1 Saund. 9 *b., n. 1*; 290, *n. 2*. If the deed, &c., be set forth on oyer, the court must adjudge upon it as parcel of the record, though it were not strictly demandable at the time of granting it: 1 Saund. 316-7; 3 Salk. 119; Carth. 513. The deft., by craving oyer, and setting it out in his plea, may sometimes aid a defect in the declaration: 2 Ld. Raym. 1541; Cro. Car. 209: see further, as to oyer, 1 Chit. Pl. 375.

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## PROMISSORY NOTES.

FORM OF REMEDY AND PLEADINGS.] The observations already made as to the form of remedy and pleadings, for the recovery of money due on a bill of exchange, will be here applicable: *ante*, 258 to 267. The statute of 3 and 4 Anne c. 9, made perpetual by 9 Anne c. 25, puts promissory notes made in England on the same footing as bills of exchange. As to notes in Scotland, see *Milne v. Graham*, 1 B. & C. 192; 2 D. & R. 293, *s. c.* As to what a good note, see Chit. B. 328-9. In *Heylin v. Adamson*, 2 Burr. 676, Lord Mansfield declared that though, while a promissory note continues in the original shape of a promise from one man to pay another, it bears no similitude to a bill, yet, when it is indorsed, the resemblance begins; for then it is an order by the indorser upon the maker of the note to pay to the indorsee; the indorser becomes as it were, the drawer, the maker of the note the acceptor, and the indorsee the payee. This point of resemblance once fixed, the law relative to bills becomes applicable to promissory notes: Chit. B. 330.

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### \*Precedents.

[\*741]

PAYEE AGAINST MAKER OF NOTE, NOT PAYABLE AT A PARTICULAR PLACE, AND ALSO, WHEN THE ACTION IS AGAINST ONE OF THE MAKERS OF A JOINT AND SEVERAL NOTE.

(Commencement as *ante*, "Declaration.") For that whereas the said deft., (if the deft. be sued alone on a joint and several note, say, "and one A. B.,") heretofore, to wit, on the — day of January, in the year of our Lord 1813 (*date of note*.) at London, that is to say, at Westminster, in the county of Middlesex, made his (their) certain promissory note

in writing, bearing date the day and year aforesaid, and thereby then and there (the said deft. and the said A. B. jointly and severally) promised to pay, two months after date thereof, to the said plt., or order, the sum of £50, for value received, and (the said deft. and the said A. B.) then and there delivered the said promissory note to the said plt.; by means whereof, and by force of the statute in such cases made and provided, the said deft. then and there became liable to pay the said plt. the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and, being so liable, he, the said deft. in consideration thereof afterwards, to wit, on the day and year aforesaid, at Westminster aforesaid, in the county aforesaid, then and there faithfully promised the said plt. to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof. (*Add such counts as may be applicable to the debt for which the note was given, common money counts, interest and account stated, and usual breach, laying the day in the common counts after the money was due, and very recently. When the action is against one of the makers of a joint and several note, add a count as on a note to deft. alone without noticing the other joint maker:*) 1 B. & A. 224; 4 Camp. 34.) Yet the said deft., not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plt. in this behalf, hath not yet paid the said sum of money, or any part thereof, to the said plt. (although oftentimes afterwards requested,) but the said deft. to pay the same or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said plt. of £—; and therefore he brings his suit, &c.

#### WHEN BY AN AGENT.

For that whereas the said deft., heretofore, to wit, on, &c., at, &c., by one A. B., his then agent in that behalf, made (*as supra. The agent's name should not be afterwards mentioned. It is not necessary to state at all that the note was made by an agent.*)

#### PAYEE AGAINST MAKER, WHEN NOTE PAYABLE AT A BANKER'S OR OTHER PARTICULAR PLACE.

For that whereas the said deft., heretofore, to wit, on the 1st day of January, in the year of our Lord 1813, at London, that is to say, at Westminster, in the county of Middlesex, made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay at Messrs. Drummonds and Co., bankers, Charing Cross, two months after the date thereof, to the said plt., by the name and addition of John Twis, Esq., or order, the sum of £50, for value received, and then and there delivered the said promissory note to the said plt. And the said plt. in fact saith, that, afterwards, and when the said note became due and payable, according to the tenor and effect thereof, to wit, on the 4th day of March, in the year aforesaid, at the said Messrs. Drummonds and Co., bankers, at Charing Cross, aforesaid, to wit, at Westminster, aforesaid, in the county aforesaid, the said promissory note was duly presented and shown to and at the said Messrs. Drummonds and Co., at Charing Cross, aforesaid, for payment thereof, and payment of the said sum of money therein specified, was then and there duly required, according to the tenor and effect of the said promissory note, but that neither the said Messrs. Drummonds and Co., nor the said deft., nor any other person or persons on the behalf of the said deft., did or would, at the said time when the said promissory note was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do; all of which said several premises the said deft., afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, in the county aforesaid, had notice. By means whereof, and by force of the statute in such [*\*742*] case made and provided, the said deft. then and \*there became liable to pay to the said plt. the said sum of money in the said promissory note specified, when he, the said deft., should be thereunto afterwards requested; and, being so liable, he, the said deft., in consideration thereof, afterwards, to wit, on the day and year last aforesaid, undertook, and then and there faithfully promised the said plt., to pay him the said sum of money in the said promissory note specified, when he, the said deft. should be thereunto afterwards requested. (*Here insert a count, as ante, 741, on a note payable generally, and such other of the common counts as may be applicable, ante, 741.*)

#### FIRST INDORSEE AGAINST MAKER, WHERE NOTE NOT PAYABLE AT A PARTICULAR PLACE.

For that whereas the said deft., heretofore, to wit, on the first day of January, in the year of our Lord 1813, at London, that is to say, at Westminster, in the county of Middle-



sex, made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, two months after the date thereof, to one John Twis, or order, the sum of £50, for value received, and then and there delivered the said promissory note to the said John Twis. And the said John Twis, to whom, or to whose order the payment of the said sum of money in the said promissory note, specified, was to be made, after the making of the said promissory note and before the payment of the said sum of money therein specified, to wit, on the same day and year aforesaid, at Westminster aforesaid, in the county aforesaid, indorsed the said promissory note; by which said indorsement he, the said John Twis, then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plt., and then and there delivered the said promissory note, so indorsed, as aforesaid, to the said plt. By means whereof, and by force of the statute in such case made and provided, the said deft. then and there became liable to pay the said plt. the said sum of money in the said promissory note specified according to the tenor and effect of the said promissory note; and being so liable, he, the said deft. in consideration thereof, afterwards, to wit, on the day and year aforesaid, at Westminster aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said plt., to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof. *(Here insert money-counts, count for interest and account stated, and common breach. There being no privity of contract between indorsee and maker of a note, it is not usual to say any other counts, as in the preceding precedents; and conclude as ante, 741.)*

#### SECOND INDORSEE AGAINST MAKER, WHERE NOTE NOT PAYABLE AT PARTICULAR PLACE.

For that whereas the said deft., heretofore, to wit, on the 1st day of January, in the year of our Lord, 1813, at London, that is to say, at Westminster, in the county of Middlesex, made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay two months after the date thereof, to one John Twis, or order, the sum of £50, for value received, and then and there delivered the said promissory note to the said John Twis. And the said John Twis, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at Westminster, aforesaid, in the county aforesaid, indorsed the said promissory note; by which said indorsement he, the said John Twis, then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to one Henry Field, and then and there delivered the said promissory note so indorsed to the said Henry Field. And the said Henry Field, to whom or to whose order the payment of the said sum of money in the said promissory note specified, to wit, on the day and year aforesaid, at Westminster, aforesaid, in the county aforesaid, indorsed the said promissory note; by which said indorsement he, the said Henry Field, then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to the said plt., and then and there delivered the said promissory note, so indorsed, as aforesaid, to the said plt. By means whereof, and by force of the statute, in such case made and provided, the said deft. then and there became \*liable to pay to the said plt. the said sum [\*743] of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he, the said deft., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at Westminster aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said plt. to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof. *(Add the common counts, as directed in the last precedent, and conclude as ante, 741.)*

#### FIRST INDORSEE AGAINST MAKER, WHERE NOTE PAYABLE AT A PARTICULAR PLACE.

For that whereas the said deft., heretofore, to wit, on the 1st day of January, in the year of our Lord, 1813, at London, that is to say, at Westminster, in the county of Middlesex, made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay at Messrs. Drummonds and Co., bankers, Charing Cross, two months after the date thereof, to one John Twis, Esq., or order, the sum of £50, for value received, and then and there delivered the said promissory note to the said John Twis. And the said John Twis, to whom, or to whose order, the payment of the said sum of money in the said promissory note specified was to be made, after the

making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at Westminster aforesaid, in the county aforesaid, indorsed the said promissory note; by which said indorsement the said John Twis then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plt., and then and there delivered the said promissory note, so indorsed, as aforesaid, to the said plt. (*If the plt. be a second or subsequent indorsee, here insert a second and third indorsements.*) And the said plt. avers that, afterwards, to wit, on the 1st day of March, in the year aforesaid, at the said Messrs. Drummonds and Co., bankers, at Charing Cross, afterwards, to wit, at Westminster aforesaid, in the county aforesaid, the said promissory note was duly presented and shown to and at the said Messrs. Drummonds and Co., at Charing Cross, aforesaid, for payment thereof, and payment of the said sum of money therein specified, was then and there duly required, according to the tenor and effect of the said promissory note, but that neither the said Messrs. Drummonds and Co., nor the deft., nor any person or persons on behalf of the said deft., did or would, at the time when the said promissory note was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do, of all which said several premises the said deft., afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, in the county aforesaid, had notice. By means whereof, &c. (*Conclude as ante, 741, third precedent. Insert common counts, as directed in third precedent.*)

#### FIRST INDORSEES AGAINST FIRST INDORSER.

For that whereas one James Hall, heretofore, to wit, on the 1st day of January, in the year of our Lord 1813, at London, that is to say, at Westminster, in the county of Middlesex, made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, at Messrs. Drummonds and Co., bankers, Charing Cross, two months after the date thereof, to the said deft., by the name and addition of John Twis, Esq., or order, the sum of £50, for value received, and then and there delivered the said promissory note to the said deft. And the said deft., to whom, or to whose order, the payment of the said sum of money in the said promissory note specified, was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at Westminster, aforesaid, in the county aforesaid, indorsed the said promissory note, by which said indorsement, he the said deft. then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plt. and then and there delivered the said promissory note, so indorsed, as aforesaid, to the said plt. And the said plt. avers that afterwards, when the said promissory note become

[\*744] \*due and payable, according to the tenor and effect thereof, on the 4th day of March, in the year aforesaid, at the said Messrs. Drummonds and Co., bankers, Charing Cross, aforesaid, to wit, at Westminster, aforesaid, in the county aforesaid, the said promissory note was duly presented and shown to and at the said Messrs. Drummonds and Co., bankers, Charing Cross, aforesaid, for payment thereof, and payment of the said sum of money therein specified was then and there duly required, according to the tenor and effect of the said promissory note, but that neither the said Messrs. Drummonds and Co., nor the said James Hall, nor any person or persons on behalf of the said James Hall, did or would, at the said time when the said promissory note was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do; of all which said several premises the said deft., afterwards, to wit, on the day and year last aforesaid, at Westminster, aforesaid, in the county aforesaid, had notice. By means whereof, &c. (*Conclude as ante, 741. Insert common counts, laying the day after the note was due; third precedent, counts for original debt, between plt. and deft., all the money-counts, count for interest, and account stated, and breach; and conclude as ante, 741.*)

#### Evidence.

We have already seen that bills and notes much resemble each other, and the rules of evidence in support of an action on a bill will be here applicable.

## PROTEST.

**EFFECT OF.]** A protest is of no effect in the case of an inland bill: *Windle v. Andrews*, 2 B. & A. 696. But in actions against the drawer or indorser of foreign bills, a protest must be made; and, in the case of a foreign bill, notice, unaccompanied with a protest, is insufficient, unless the party to whom it was given reside in this country, *Robins v. Gibson*, 1 M. & S. 288, though he may be absent at the time of the dishonour: *Cromwell v. Hyson*, 2 Esp. Rep. 511: see further, *ante*, 294, 295.

The protest made by the captain of a ship is not evidence of the facts contained in it, either in cases of insurance or demurrage, &c., *ante*, 428, 600, though it is both usual and more safe to make them.

**PROOF OF.]** The protest is an instrument under the hand and seal of a notary public, and is evidence of itself; the production of the instrument is, therefore, sufficient: Anon. 12; Mod. 345.

## PUBLIC DOCUMENTS, BOOKS, &amp;c.

Public documents are, in general, evidence of the facts stated therein, on the ground of their having been made by authorized and accredited agents appointed for the purpose, and of their publicity or antiquity: 1 Stark. Ev. 160.

The journals of the Houses of Lords and Commons have always been admitted as evidence of their proceedings: Cowp. 72; 5 T. R. 465. A \*copy of the minutes of a judgment of reversal in the [\*745] House of Lords, though unstamped, and without more of the proceedings, is evidence of such reversal: *ib.* But the journals are not evidence of particular facts stated in the resolutions, which are not a part of the proceedings of the House: 4 St. Tr. 39; 2 Salk. 509, *ante*, 695.

The king's proclamations are evidence of the facts stated or recited in them; thus, a proclamation for reprisals is evidence of an existing war: 30 How. St. Tr. 493; Fost. C. L. c. 2, s. 12; and see 1 Ld. Raym. 283; 4 M. & S. 532. They may be proved by production of the Gazette in which they are inserted: 8 Price, 89. Articles of war, printed by the king's printer, are evidence as such: 5 T. R. 446; 55 G. 3, c. 108, s. 36; 4 B. & C. 304; 6 D. & R. 413. A paper from the secretary of state's office, transmitted by the British ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another state, is admissible for the purpose of showing the precise period of the commencement of the war: 4 Esp. Rep. 266. Acts of state may be proved by a production of the official printed document authorized by government: 1 Stark. Ev. 416. Acts of state of a foreign government may be proved by copies examined with the public archives abroad; a copy printed and published abroad by the authorized printer of the foreign government, will, it seems, be admissible in evidence: *Richardson v. Anderson*, cited 1 Camp. 65, n. (a); *Rex v. Holt*, 5 T. R. 436; B. N. P. 226.

The Gazette is evidence of all acts of state, and of every thing done by the king in his regal character; but it is not stronger evidence of any private matters than any other newspaper. However, when published by authority, it is evidence of all acts of state contained therein, as the publication of the addresses of different bodies of subjects to the king, received by him in his public capacity: 5 T. R. 443; B. N. P. 249; 9 St. Tr. 259, cited by *Buller, J.*, 5 T. R. 445. It is also evidence of the king's proclamation, and must be produced: 2 Camp. 44. As, a proclamation for performance of quarantine, *per Kenyon, C. J.*, 5 T. R. 443; and for a public peace, or any act done by or to the king, in his legal capacity: *ib.*; 8 St. Tr. 212; Rep. temp. Holt, 296; 8 Price, 89; B. N. P. 226; Doug. 594. But the publication must have reference to acts of state, or the Gazette will not be admissible, as when it merely contains a grant by the king to the subject of a tract of land, or presentation, 5 T. R. 443; nor will it be receivable to prove a military appointment: *Rex v. Gardner*, 2 Camp. 513; 5 Esp. Rep. 233.

It is evidence as a medium to prove *notices*, in the same manner as other newspapers. Thus, an insertion in a Gazette of a dissolution of partnership is evidence of such dissolution; but it must appear that the party took it in, or was in the habit of reading it: 1 Stark. 186; 2 *ib.* 255; Peake Rep. 154; 1 Esp. Rep. 371, *s. c.*; 2 Camp. 617; *Gorham v. Thompson*, Peake, 42; 1 Stark. 420; *ante*, 712. Notice of a bankruptcy in a Gazette is rendered sufficient by 6 G. 4, c. 16, s. 3. In giving evidence of the Gazette, it seems unnecessary to prove it was bought of the Gazette printer, or where it came from: R. & M. Cr. C. 277.

The almanac is admissible as evidence, and by it any particular day may be proved: Cro. El. 226-7; Mod. 81; Sid. 300; 1 Leon. 142.

The king's sign-manual, authorizing the release of a prisoner, is evidence of the legality of his being at large. Leach, C. L. 69. As to the license of the pope, and his bull being evidence, see *post* "*Tithes*." An endowment by a bishop, under his seal, would be evidence, if derived from proper custody: 4 Gwill. 1453. The registry of a trade in the books of the office of state, is evidence of a license: 2 Taunt. 237. An entry in a register of a bishop's institution or collation is admissible in evidence: 1 Wils. 215. The certificate of the bishop is conclusive evidence, in some cases, of the facts therein stated: Willes, 549, *post*. A

[\*746] \*curacy may be proved to have been augmented by showing an order for the augmentation, entered in a book, and signed by the governors of Queen Anne's bounty, according to the 1 G. 1, *st.* 2, c. 10, s. 20, without proof that the money was laid out in land, and allotted by deed, under the corporation seal of the governor, to be annexed to the curacy, and that such deed was enrolled within six months after its execution, according to that statute, and the statute of 9 G. 2, c. 37: 1 East, 478.

Certificates, and other documents made by persons entrusted with authority for the purpose, are evidence, to the extent of the officer's authority, of the facts he is directed to certify: B. N. P. 229; 1 Stark. Ev. 173. And where a court has, for its own convenience, appointed an officer to make out copies, such copies are evidence in that court, though not elsewhere. The indorsement of the officer, upon a deed of bargain and sale, is evidence of the enrolment: Doug. 57. The chirograph of a fine is evidence of the fine, because the officer is appointed to give out copies of the agree-

ment between the parties that are lodged of record, and wherever it is an essential part of the officer's duty to deliver out copies of record, such copies are evidence: 2 Stark. 7, 13. An office copy of depositions is admissible in equity, without examination with the roll, but it is not receivable in a court of law: B. N. P. 299; 2 Stark. C. N. P. 6. The books from the master of the office of the court of K. B. are sufficient to prove a person an attorney of that court. The prison books of the Fleet and King's Bench are admissible to show the period of a prisoner's commitment or discharge, 1 Leach, C. C., 436; but copies of them will not be allowed in evidence, nor can they be adduced to show the cause of the prisoner's commitment, *Salle v. Thomas*, 3 B. & P. 138, 1 Phil. Ev. 395; nor to prove a marriage, Peake's Rep. 231; 1 Coop. Ch. C. 155. The book kept in the office of the secretary of bankrupts, is good secondary evidence of the allowances of the certificate by the lord chancellor: 3 Camp. 499. Books in the Herald's Office are admissible in evidence on a question of pedigree, Yelv. 34, 2 Jones, 164, 224, 1 Str. 162, 1 Salk. 281: so are their visitation-books of counties, 1 Str. 161, Comb. 63; but an extract of the record shall not be allowed in evidence: B. N. P. 248. The poll-books at an election for a member of parliament, or for a mayor, are evidence: Willes, 424. A book kept in the office of the auditor of the Bishop of Durham is admissible, to sustain the claims of a lessee to the bishop, on proof of the original and counterpart of the lease being lost: Holt, B. N. P. 601. The certificate of the bishop, in cases involving matter of law as well as of fact, is sometimes evidence: as, where issue is joined upon the record, in certain real writs, upon the legality of a marriage, or its immediate consequences, general bastardy, or, in like manner, in some particular instances lying peculiarly within the knowledge of the spiritual courts, as profession, deprivation, and some others, in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and the certificate, when returned, received and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world on that point: see How, St. Tr. 399; Co. D. *Certificate*, Willes, 549. In bastardy, the trial by the bishop's certificate takes place at this day only in the case of a general allegation of bastardy, and that only so long as the party is living, and not only living, but a party to the suit, and not only a party to the suit, but an adult; and, in matrimony, in the two cases of dower and appeal only: 2 H. Bl. 156.

The rolls of a court baron are admissible in evidence between the lord of the manor and his tenants or copyholders, though they will not be evidence for him against a stranger: Gilb. Ev. 67; 4 T. R. 670. Ancient writings, kept among the court-rolls, have been admitted in evidence, although not signed by any of the tenants: 1 T. R. 466, 473; 13 East, 10. \*Entries on the rolls of the customary court are [\*747] evidence of a custom: 5 T. R. 26; 2 M. & S. 92; 10 East, 520.

The registry of deputations in the office of the clerk of the peace is evidence to show that the party causing the registry to be made, exercised rights as lord of the manor: 3 B. & A. 353; and see M. & Y. 417. By the 7 and 8 W. 3, c. 7, s. 5, the entry in the book kept by the clerk of the crown for entering returns, alterations, and amendments, or a copy of so much as relates to the return, as made evidence in an action for a false or double return.

Bank books are admissible to prove the transfer of stock: Peake Rep.

44; 2 Esp. Rep. 665. An entry in a register in the Navy Office, of the death of a person, is evidence of that fact: *Leach*, C. C. L., 3 ed. 29; *ib.* 24; *Wallace v. Cook*, 5 Esp. Rep. 117; 3 *ib.* 190; B. N. P. 249; *Bac. Ab. Ev.* 635. And the log-book of a vessel, produced from the Admiralty, is evidence of the time of sailing of a convoy: 1 Esp. Rep. 427. An entry in the book kept at Lloyd's is evidence of the capture of a ship: 2 Esp. Rep. 242. The copy of an official paper, containing the number of passengers on board a vessel, made in pursuance of an act of Parliament by the captain, and deposited at the India House, is admissible in evidence, to show the number and description of the persons on board the vessel: 2 Bing. 229; 1 R. & M. 66, *s. c.* A copy from the Custom House of the searcher's report of the cargo kept there, is admissible in evidence, to show that the property therein specified was put on board: *Johnson v. Ward*, 6 Esp. Rep. 48. Books transcribed by officers of excise from specimen papers, are admissible in evidence: *Rex v. Grimwood*, 1 Price, 371. But returns of sales of corn under the 1 and 2 G. 4, c. 87, are not conclusive evidence to show the parties to whom the corn was delivered: 2 Bing. 527.

The registers kept in churches, of births, marriages, and burials, are in general admissible in evidence of those facts, *Godb.* 145, *Sid.* 71, B. & P. 247; so are copies of them: *ib.* The register being the best evidence, if the entries are first made in a day-book, such book is not evidence to control the register, 2 Str. 1073; unless, indeed, other evidence be adduced to show the entry in the day-book was made under the direction of the father or mother: *Phil. Ev.* 415. The copy of a register of a foreign chapel is not admissible here to prove a marriage abroad, *Leader v. Barry*, 1 Esp. Rep. 353; nor is the copy of a register of baptism in Guernsey, *Huet v. Le Mesurier*, 1 Cox. Cas. 175; nor of a register of a dissenting chapel: 1 Ph. Ev. 315; and see 1 Jack. & W. 483. To prove infancy, a statement of a child's birth, inserted in the entry of the register of the christening, is insufficient, *Wißen v. Law*, 3 Stark. 63; *Rex v. Clapham*, 4 C. & P. 29; nor would such register be evidence that he was born in a particular parish: *Rex v. North Petherton*, 5 B. & C. 508.

An entry in a vestry-book is admissible to show pl't.'s right to a pew, *Price v. Littlewood*, 3 Camp. 288; it will also be admissible to substantiate an averment in an indictment, that "deft. was *duly elected* treasurer of the said parish:" *Rex v. Martin*, 2 Camp. 100. By 17 G. 2, c. 38, s. 14, churchwardens and overseers of the poor are authorized to enter in a book, provided for that purpose, true copies of all rates and assessments made for the relief of the poor, within fourteen days after all appeals from such rates are determined, and shall attest the same by putting their names thereto: and they are required to produce it at the general or quarter sessions, where any appeal is to be heard or determined: 1 Phil. Ev. 393; 1 Stark. Ev. 177; see 3 B. & C. 658; 3 D. & R. 572, *s. c.*; 1 Y. & J. 10. By 42 G. 3, c. 40, overseers are required to keep a book, and enter therein the names of all parish apprentices, and of the other particulars required by the act, which entries are to be signed by the justices who sanction the indenture of apprenticeship: and, in the event of such indenture being lost or destroyed, the book in which [\*748] such entry has been made shall be deemed to be sufficient evidence, in all courts of law, in proof of the existence of such indentures: *ib.*, *ibid.*

The books of a corporation, whether containing entries of a public or private nature, are admissible in evidence as between themselves, but not as against a stranger: 1 H. Bl. 214, *n. (c.)*; Cowp. 102; 2 Str. 93; 12 Vin. Ab. 90, *pl.* 16. Nor will an entry of a private nature, though made in the public books of the corporation, be receivable in evidence, "for that fact will not make the entry of a public nature, because it happens to be made in a public book;" and, "it will still fall within the rule applicable to private books, that they cannot be given in evidence for the party to whom they belong:" *Marriage v. Lawrence*, 3 B. & A. 144; 2 B. & A. 185. In questions of public right, such as the swearing and admitting freemen, such books are evidence against a stranger: 17 How. St. Tr. 810, 854. In all cases where the books of a corporation are admissible in evidence, it must appear that they were regularly kept by the proper officer, though entries made by other persons are sufficient, if good cause be shown why the proper officer has not acted; 1 Str. 92; 12 Vin. Ab. Ev. (*a. b.* 15,) *pl.* 16.

The poll-books which are kept at an election for members of parliament are admissible in evidence, when duly signed; and they may either be proved by producing the original books, or the production of an examined copy, as in the case of other records: *Mead v. Robinson*, Willis, 424; *Rea v. Davis*, 2 Str. 1048.

Doomsday-book is admissible in evidence, to show a particular estate: Hob. 188; Gilb. Ev. 78, 2 *ed.*; Bac. Ab. Ev. 633; B. N. P. 248. Ancient surveys are admissible to show the boundaries of a manor, but they will not be allowed as evidence for the lord against a stranger: 1 Str. 95; 1 Ld. Raym. 734. The *valor beneficiorum*, or Pope Nicholas' taxation, is admissible to prove the rate and value of ecclesiastical benefices, 2 Price, 477; and the new *valor beneficiorum*, made in 26 H. 8, to prove the first fruits and tenths of ecclesiastical promotions: 5 Price, 377; 4 Dow, 324; Cro. Car. 455; 2 Lutw. 1305; 2 Gwill. 536; 4 Price, 221. A survey of the ancient possession of religious houses has been admitted to prove a vicar's right to certain tithes: Wils. 170; 2 Gwill. 542. A survey of the king's ports is evidence: Gilb. Ev. 77. Parliamentary surveys are admissible in evidence: 1 M. & S. 292; 11 East, 284; 1 Mod. 117.

General histories are admissible to prove a matter relative to the kingdom at large: B. N. P. 248; Vin. Ab. Ev. (*A. b.* 46.) So, Speed's Chronicle has been admitted to prove a particular point in history: Skin. 14; 1 Vent. 151; 1 Salk. 282; Skin. 623, *s. c.* But a particular custom cannot be proved by the production of a general history: B. N. P. 248; 1 Burr. 14; 1 Salk. 282; Skin. 623; *Piercey's case*, 2 Jon. 164. The year-books are admissible to prove the course of the courts: 1 Salk. 282.

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### PURCHASE.

*Ante*, GOODS SOLD; *post*, VENDOR AND PURCHASER.

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### REBUTTER.

A REBUTTER is the deft.'s answer in pleading to the plt.'s surrejoinder. It seldom occurs in pleading. The qualities and form of it are governed

by the same rules as the deft.'s rejoinder or pleas: see *Forms of Rebuttal*, in 3 Chitty's Pleading.

[\*749]

\*RECEIPT.

**EFFECT OF.]** It is not necessary to have a receipt given in any specific terms; it is sufficient if it purports to be a discharge, and is intended to operate as such: *per* *Ld. Kenyon*, 2 Esp. Rep. 621; see *post*, "*Release*," *ante*, "*Payment*."

When a receipt is given under *hand and seal*, it operates as a bar, and the party is thereby estopped in a court of law from setting up parol evidence inconsistent with the terms of such deed: *Gilb. Ev.* 142; 1 B. & C. 707; 2 Taunt. 141. However, where *recitals in a deed* show that the money has not been paid, the words of the release and receipt are restrained in their operation, and must be controlled by the previous recital: *Lampon v. Corke*, 5 B. & A. 606; 1 D. & R. 211, S. S.; *ante*, 43.

A receipt not under seal is, in general, nothing more than a *prima facie* acknowledgment that the money has been paid; therefore, it is not a discharge of the action, nor is it pleadable in bar: *per* *Abbott, C. J. Skaipe v. Jackson*, 3 B. & C. 423; 5 D. & R. 290. It is not an estoppel, and the circumstances under which it was obtained may be shown: *ib.*; 4 B. & A. 611. Therefore, if one of several plts., or a nominal plt. suing for another person beneficially interested, by collusion with the deft., fraudulently give him a receipt for the debt, though no money have passed between them, the court will preclude the deft. from availing himself of such a receipt, on motion: 1 B. & P. 447. And, on the production of such receipt, the plts. are not thereby estopped from bringing evidence on the trial to prove that the money had not been paid over to them, and that the giving the receipt must be considered a nullity: *Benson v. Bennet*, cited 1 Camp. 304, *in notis*. [Where a receipt was given by one of several partners, without the knowledge of the others; held, in an action to recover the partnership debt, that evidence was admissible to show that the receipt was fraudulently given by the particular partner: *Farrar v. Hutchinson*, 1 Perr. & Dav. 437.] It may also be shown that the receipt was not given under a full knowledge of the circumstances, but was founded on mistake or misapprehension: 2 T. R. 366, *Benson v. Bennet*, cited 1 Camp. 394; 4 B. & C. 715; 6 D. & R. 413; *ante*, 675.

In general, however, a receipt, especially if it be in full of all demands, is the strongest *prima facie* evidence of the truth of it: 1 Camp. 398; 1 Esp. Rep. 174; 3 Stark. Ev. 1044. If a party give a receipt for the last rent, the former is presumed to be paid, because he is supposed first to receive and take in the debts which are of the longest standing: *Gilb. L. E.* 142. A written acknowledgment of the payment of money, stamped as a receipt, is *prima facie* evidence of the fact of payment, although there may be other writing on the same paper, amounting to an agreement, provided this does not in any manner control or qualify the former part: 1 Camp. 387; 2 *ib.* 407. A receipt on the back of a bill of exchange is *prima facie* evidence of payment by the acceptor: *Peake's Rep.* 25. Acknowledgments entered at different times on unstamped paper are not evidence of the payments made, but a bill containing an



account of debits and credits, and made out at one time, to be delivered to the deft., as showing the balance against him, is evidence for the deft.: 2 B. & P. 501, 502, *n.* A receipt is evidence of payment to an agent, if a person acknowledges therein that he has received money, and thereby accredits the agent with the principal to that amount; so, the acknowledgment in a policy of assurance, of the receipt of the premium from the assured, is conclusive evidence of that fact between the underwriters and the assured: 1 Camp. 532. A receipt for rent, stating it to be a year's rent, up to a particular day, is *prima facie*, evidence of the commencement of the tenancy at that day: *Doe v. Samuel*, 5 Esp. Rep. 173.

PROOF AS TO.] The receipt should be produced, duly stamped and proved, by, showing the party's handwriting: *ante*, "Handwriting." If there be a subscribing witness, he should be subpoenaed: *ante*, 425. As to the requisite stamp, *post*, "Stamp." A payment may be proved by \*other evidence than the receipt, and even where a [\*750] receipt has been taken; as it is not like a case of contract, which, if reduced into writing, can be proved only by the production of the writing. And, where a receipt is void for want of a stamp, it may be shown to a witness, to refresh his memory: 1 Ph. Ev. 501; 4 Esp. Rep. 215; 1 East, 460; 1 Saund. R. 325. (*b*)

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RECOGNIZANCE OF BAIL, ACTION ON.

FORM OF REMEDY AND PLEADINGS.] The more usual remedy on a recognizance is by *sci. fa.*, as it is more expedient than any other method of proceeding, and the bail have less opportunity of discharging themselves by rendering their principal: Tidd. 548. An action for debt is, however, sometimes brought, *ib.*; and it is sometimes preferable to proceed in debt, as no costs are allowed in a *scire facias*, unless the deft. appears, Tidd, 9th. ed. 1100; and damages are not recoverable in a *scire facias*: *ib.* If the bail be bound jointly and severally, as is usual, the action may be against one of them only: Cro. Jac. 45. The action need not be in the same court as that in which the recognizance was entered: 3 Salk. 55; 7 T. R. 355.

Declaration.] The *venue* is local, and must be in Middlesex: Hob. 196; 2 Saund. 72; 2 Smith. 14; 5 East, 461. As to the *venue* in an action on a recognizance, taken before a commissioner at Durham, see 2 Moo. 66. The declaration must state the recognizance with certainty, pursuing the description in the entry of the recognizance; it should allege in what court, and at whose suit, and for what sum or cause the deft. became bail: 1 Wils. 284. A variance would be fatal, under *nul tiel record*: *ib.*; 2 Salk. 564; 1 Burr. 409; 8 Taunt. 171; 2 Moo. 66. It must be averred, in positive terms, that the recognition is a record: *Stephenson v. Grant*, 2 N. R. 103. The breach must be stated according to the terms of the recognizance. Where, in an action against two, a recognizance of bail was given "in case the said C. and D. should happen to be condemned, and should not pay or render themselves," and a *scire facias* thereon, after showing that C. was condemned;

but not D., assigned a breach that C. and D. did not pay, nor render, &c., it was held that the breach, though in the words of the recognizance, was defective, since, with that allegation, it was quite consistent that C. had paid or had rendered himself, which would have satisfied the recognizance; and, as D. was not condemned, he was not bound either to pay or to render: *Wilkinson v. Thorley*, 4 M. & S. 33. But, where two were sued in an action of assumpsit, and a recognizance of bail was given, in case the said C. and D. should happen to be condemned, and it was averred, in the declaration, that C. was condemned, but no notice taken why D. was not also, it was considered sufficient, since D. might have died, or become a certificated bankrupt before judgment, which fact will be presumed; *ib.* 34.

*Plea.*] The deft. cannot plead *nil debet*, and plt. should demur, to such plea, or he will be put to prove all the allegations in his declaration; *ante*, 406; 1 Saund. 38, *a.*, 2 *id.* 344. *Nul tiel record* may be pleaded either to the recognizance or judgment stated in the declaration, or to both: 1 Saund. 92; Com. D. *Pleader*, 2 W. 13. The bail may plead that no *ca. sa.* was issued and returned against principal, before the action brought against bail, but they cannot plead a mere irregularity in the *ca. sa.*: *ib.*; 1 D. & R. 50; 2 Burr. 1187; 4 East, 309. They may also plead the render, 1 Ld. Raym. 156, 1 Salk. 101, or death of the principal before the return of the *ca. sa.*, 2 Ld. Raym. 1256, Wils. 334, 3 [\*751] Chit. Pl. 995; but the plea \*must not be that the principal died before the issuing, or after the return of the *ca. sa.*; 10 Mod. 268, 603; 8 Mod. 31; 2 Str. 717; 6 T. R. 284; 2 Saund. 72, *a.* Payment by 4 Anne, c. 16, s. 12, or release to the principal or co-bail, may be pleaded by them; they cannot, however, plead the principal's bankruptcy and certificate: 1 B. & P. 448; 5 Moo. 168; 1 D. & R. 50, 16 East, 39. It seems, bail may plead a writ of error sued out and allowed before the return of a *ca. sa.*: 2 East, 439.

*Replication.*] On *nul tiel record* pleaded, the plt. must reply the existence of the record, and conclude *prout patet per recordum*, praying, also, that it may be seen and inspected by the court: 1 Saund. 92, 93; Com. D. *Pleader*, 2 W. 13. On plea of no *ca. sa.*, the plt. must reply, setting it forth and the return, concluding with a verification, 2 T. R. 576; *sed vide*, 2 Marsh. 354, 7 Taunt. 30, as to the conclusion. When the *ca. sa.* does not appear to have been issued into the county where the venue in the original action was laid, the deft. may traverse the allegation, or rejoin the fact: *Dudlow v. Watchorn*, 16 East, 39. If the plea be that the principal died, before the return of the *ca. sa.*, the writ and return must be replied, and it must be averred that the principal was living at the return of the writ: 2 East, 313.

### Precedents.

DEBT ON A RECOGNISANCE OF BAIL, BY BILL IN K. B.

(Commencement as usual in debt, *ante*, 406.) For that whereas the said deft., heretofore, to wit, in ——— Term, in the ——— year of the reign of our lord the now king, came personally into the court of our said lord the king, before the king himself here, the said court then and still being holden at Westminster, in the county of Middle-

sex, in his proper person, and then and there became pledge and bail for one E. F., that, if it should happen that the said E. F. should be convicted at the suit of the said plt. against the said E. F., then the said deft. consented and agreed that all such damages (or, in debt, "that as well the said debt, as all such damages") as should be adjudged unto the said plt. in that behalf, should be made of his lands and chattels, and levied to the use of the said plt., if it should happen that the said E. F. should not pay unto the said plt. those damages, (or, in debt, "the said debt and damages.") or render himself on that occasion to the prison of the Marshalsea of our lord the king, before the king himself, as, by the record of the said recognizance still remaining in the said court of our said lord the king, before the king himself here, to wit, at Westminster, aforesaid, more fully appears. And, although the said plt., afterwards, that is to say, in, &c., the same Michaelmas term, in the 47th year aforesaid, in the said court of our said lord the king, before the king himself here, to wit, at Westminster, aforesaid, in the county of Middlesex, aforesaid, by bill, without the writ of our said lord the king, and by the consideration and judgment of the said court, recovered in the said plea against the said E. F. £—, for his damages, which he had sustained as well on the occasion of not performing certain promises and undertakings, then lately made by the said E. F. to the said plt., as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. is convicted, as by the record and proceedings thereof, still remaining in the said court of our said lord the king, before the king himself here, to wit, at Westminster, aforesaid, more fully appears; yet the said E. F. hath not paid to the said plt. the said damages, costs, and charges, or any part thereof, nor rendered his body on that occasion to the prison of the marshal of the Marshalsea of our said lord the king, before the king himself, according to the form and effect of the said recognizance, and as well the said recognizances as the said judgment still remain in full force and effect, in no wise satisfied, vacated, or discharged. And the said plt. hath not yet obtained any execution of the said judgment, whereby, and according to the form and effect of the said recognizance, an action hath accrued to the said plt., to demand and have of and from the said deft. the said sum of £—, in form aforesaid, recovered and above demanded. Yet, &c. (*Conclusion in debt as ante*, 408.)

\*DEBT ON A RECOGNIZANCE OF BAIL IN C. P.

[\*752]

(*Commencement in debt as ante*, 408.) For that whereas the said deft., heretofore, to wit, in ——— term, in the ——— year of the reign of our lord the now king, came personally into his majesty's court, before the Right Hon. Sir W. D. Best, Knt., and his companions, then his said majesty's justices of the bench, to wit, at Westminster, in the county of Middlesex, and then and there, in the said court here, acknowledged (*examine with the recognizance*) himself to owe to the said plt. the said sum of £—, above demanded; which said sum of £— the said deft., for himself and his heirs, did consent and grant to be made of his lands and chattels, and levied to the use and behoof of the plt., upon this condition, that, if judgment should happen in the said court here to be given for the said plt. against one E. F., in a certain plea of trespass on the case, by the said plt. against the said E. F., in the said court brought, then that the said deft. should satisfy all such damages which should be adjudged to the said plt. against the said E. F., in the same court here, in the plea aforesaid, or should render his body on that occasion to the prison of the Fleet, as by the record of the said recognizance, remaining in the said court here, at Westminster, aforesaid, may more fully appear, (*ante*, 750.) And whereas, also, afterwards, to wit, in that said ——— term, in the ——— year of the reign aforesaid, judgment was given in the said court, before the said Sir W. D. Best, Knt., and his companions, then his said majesty's justices of the bench, to wit, at Westminster, aforesaid, for the said plt. against the said E. F., in the plea aforesaid; and the said plt. then and there, by the consideration and judgment of the said court, recovered in the said plea against the said E. F., £—, which in and by the said court were adjudged to the said plt. for his damages, which he had sustained as well by the reason of his non-performance of certain promises and undertakings (*see judgment*) before then made by the said E. F. to the said plt., as for his costs and charges by him about his suit in that behalf expended, and whereof the said E. F. was convicted, as by the record and proceedings thereof, still remaining in the said court of the bench here, to wit, at Westminster, aforesaid, more fully appears. And the said plt. in fact saith, that the said E. F. hath not yet satisfied the said plt. the damages aforesaid, by the said plt. so recovered against the said E. F., as aforesaid, or any part thereof, or rendered his body on that occasion to the prison of the Fleet, according to the form and effect of the

condition of the said recognizance, and that he, the said plt. hath not yet obtained execution of the said judgment against the said E. F., nor any execution upon the said recognizance. And the said plt. further saith, that the said judgment so obtained against the said E. F. still remains in full force, strength, and effect, not in any way reversed, vacated, paid off, or satisfied, whereby an action hath accrued, &c. (*Conclude as in last precedent.*)

See form of declaration in debt on a recognizance, where the original action was by original, 2 Chit. Pl. 474; on a recognizance taken before the chief justice at C. P. at chambers, *ib.*, 477; on recognizance of bail in error, given in C. P., at Lancaster, *ib.*, 478; on recognizance of bail in error in C. P., taken before a Judge, *ib.*, 479; on a recognizance taken before a commissioner in the country, *ib.*; on recognizance of bail in the Exchequer, *ib.*, 481.

#### PLEA OF NO CAPIAS AD SATISFACIENDUM.

(*Actio non, as ante, 725.*) Because he says that, after the recovery of the said judgment, as in the said declaration mentioned, and before the exhibiting of the bill of the said plt. against him, the said deft., in this behalf, (or, if in C. P. or by original, "before the commencement of this suit,") there was no writ of *capias ad satisfaciendum* sued or prosecuted out of the said court of our said lord the king, before the king himself (or, "of the bench aforesaid,") against the said deft., upon the said judgment, and duly returned in the said court, as according to law and the custom of the said court, from time immemorial used and approved of in the said court, before the commencement of this suit, there ought to have been. And this, &c. (*Conclude with a verification, as ante, 725.*)

#### PLEA OF DEATH OF PRINCIPAL, BEFORE RETURN OF CA. SA.

[\*753] (*Actio non, as ante, 725.*) Because he says, that after the recovery of the said judgment in the said declaration mentioned, and before the return \*of any writ of *capias ad satisfaciendum* thereupon against the said E. F. (the principal,) at the suit of the said plt., upon the said judgment, to wit, on, &c. (*before issuing of sci. fa.*) he, the said E. F., died, to wit, at, &c. aforesaid. And this, &c. (*Conclude with a verification, as ante, 725.*)

See form of plea of *nul tiel record*, *ante*, 609, 3 Chit. Pl. 994; debt levied by *f. fa.* against principal, *ib.*, 990.

#### REPLICATION TO A PLEA OF NO CA. SA. AGAINST PRINCIPAL, SETTING OUT CA. SA.

(*Precludi non, as post, "Replication."*) Because he saith that he, the said plt., after the recovery of the said judgment against the said E. F., as in the said declaration is mentioned, and before the commencement of this suit, to wit, on the — day of —, in the — year of the reign of our said lord the king, sued and prosecuted out of the court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in the county of Middlesex, aforesaid, a certain writ of our said lord the king, called a *capias ad satisfaciendum*, upon the said judgment against the said E. F., directed to the sheriff of —, being the county in which the venue in the said action against the said E. F. was laid, by which said writ our said lord the king commanded the said sheriff of —, that he should take the said E. F., if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, at Westminster, on —, to satisfy the said plt. £—, for his damages, which he had sustained as well by reason of the not performing certain promises and undertakings (*see judgment*), then lately made to the said plt. by the said E. F., as for his costs and charges, by him about this suit in that behalf expended, whereof the said E. F. was convicted, as appeared to our said lord the king of record, and that the said sheriff should have there that writ; which said writ, afterwards, and before the said return thereof, to wit, on, &c., at, &c., aforesaid, was delivered by the said plt. to —, Esq., who then and there, and from and thenceforth, until and at, and after, the return of the said writ, was sheriff of —, aforesaid, to be executed in due form of law. At which day, to wit, on, &c. (*the return-day of the writ*), before our said lord the king at Westminster, came the said plt., in his own proper person, and the sheriff, to wit —, Esq., on that day returned to the said court of our said lord the king, at Westminster,

aforesaid, on the said writ, that the said deft. was not found in his bailiwick, as by the said writ of *capias ad satisfaciendum*, and the return thereof, duly affiled, and remaining of record, in the said court of our said lord the king, before the king himself, more fully appears. And this he, the said plt., is ready to verify by the said record; wherefore he prays judgment and his debt aforesaid, together with his damages, by him sustained on occasion of the detaining thereof, to be adjudged to him, &c. (*Ante*, 751, as to *Conclusion*.)

REPLICATION TO PLEA OF DEATH OF PRINCIPAL, BEFORE RETURN OF CA. SA., STATING A CA. SA. AND RETURN, AND THAT THE PRINCIPAL WAS THEN LIVING.

(*Precludi non, as post*, "*Replication*." Because he saith that, after the recovery of the said judgment against the said E. F., and before the exhibiting of the said bill of the said plt. in this behalf, (or, in C. P., "before the commencement of this suit.") to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, in the ninth year of the reign of our lord the now king, he, the said plt., sued and prosecuted, &c. (*state the issuing of the ca. sa., and the sheriff's return of non est inventus, and the reference to the writ and return as in the last precedent*.) And the said plt. further saith, that the said E. F., at the time of the issuing of the said writ of *capias ad satisfaciendum*, and at the return thereof, was living, to wit, at Westminster, aforesaid, in the county aforesaid. And this, &c. (*Conclude with a verification, as supra*.)

### Evidence.

As to proving the record on an issue of *nul tiel record*, see *post*, 755; Tidd, 701. On a plea of payment, or any other plea by deft., asserting a fact of which he is supposed to be cognizant, the burden of establishing that fact lies on the deft.: 2 East, 312; see *ante*, "*Payment*."

\*If the issue be taken on a plea of a render of principal, deft. [\*754] must prove that the principal was surrendered in due time; and, to support his plea, therefore, it must be shown that the deft. for whom he became bail above, was in custody on the return of the *ca. sa.*, which must be proved by the book of the marshal of the K. B., or the warden of the Fleet, produced by the proper officer, or an examined copy of the render, as entered there, and from which the true time will appear, and which will be a sufficient evidence. On issue taken on a plea of the death of principal, before the return of the *ca. sa.*, deft. must prove such death: *ante*, 402. On an issue joined upon the plea of no *ca. sa.* against the principal, the writ, and sheriff's return, should be proved by an examined copy of the writ from the record, as the best proof of which the nature of the case is capable: B. N. P. 234; Bac. Ab. *Ev. H.*; 4 Esp. Rep. 160; 2 M. & S. 565; *post*, "*Writ*."

### RECORDS.

FORM OF REMEDY ON, AND PLEADINGS AS TO.] Where an action is brought on a record, debt is the proper remedy; as upon the judgments of all courts of record, *ante*, 607, Gilb., tit. *Debt*, 391, Com. D. *Debt*, a. 2, 1 Chit. Pl. 100; or recognizances, &c.; and assumpsit cannot be supported, even though the party has expressly promised to perform it: *ante*, 607, 1 Rol. Ab. 11, 517; 1 Leon. 293; 2 M. & S. 309; Cro. Jac. 506-8; 1 Chit. Pl. 91. Trover cannot be supported for the conversion of a record, as it is not private property; it will lie, however, for a copy of a record: Hardw. 111.

**Declaration.]** The venue is local, and must be laid in the county where the record is: Vin. Ab. *Trial*, H. 2; 1 Chit. Pl. 242; *ante*, 608. In stating matter of record, however, it is not necessary to state the venue in the body of the declaration, as the record must be presumed to be where the court is; 1 Vent. 264; 5 East, 473. In declaring on a record, it is unnecessary to state the circumstances or consideration on which the record was founded, as its validity cannot in general be impeached in pleading, or affected by any supposed defect or illegality in the transaction it was founded on; nor can there be an allegation against the validity of a record: 1 Chit. Pl. 320. Where a record of any of the superior courts is pleaded, it must be pleaded with a *prout patet per recordum*, and not with a *proferat*, for it is in the custody of the court, and not of the party: Com. D. *Pleader*, E. 29. And so in the case, also, of the records of inferior courts, 5 Co. 75, a.; the omission, however, is only ground of a special demurrer: see further, *ante*, 608, as to declaration in debt on judgment.

As to what a variance in stating a record, see *ante*, 608.

**Pleas.]** In an action of debt on a record, when it is the foundation of the action, the plea of *nul tiel record* is proper, either where there is no record, or where there is a variance in the statement of it: Com. D. *Pleader*, 2 W. 13; and *Record*, C. However, as the plea merely denies the existence of the record, matters in discharge must be pleaded specially. And, when the record is the foundation of the action, *nil debet* is insufficient, and is defective on demurrer: 2 Saund. 344; 1 *ib.* 21. By 4 Anne, c. 16, s. 12, a debtor may plead payment in actions on records; but, to satisfy the statute, he must have paid all the money due to the record; and, if that is not the case, a plea of actual payment is defective: 4 Moo. 165. But a plea of payment is bad at common law, as it is matter in *pais*, and not of record. And a plea of accord and satisfaction is also insufficient, as not being warranted by the statute: *ib.* And, as there [\*755] can be no averment in pleading against the validity of a record, though there may be against its operation, no matter of defence can be pleaded which existed anterior to it: 2 Marsh. 392. When matter of record is pleaded, the plea should conclude with a verification by the record, "And this the said C. D. is ready to verify by the said record: wherefore," &c. As to the *prout patet per recordum*, *ante*, 608, 754. Where the plea contains matter of fact, as well as matter of record, it should not conclude with a verification by the record, but with a verification to the country: 3 Mod. 79. The plea of *nul tiel record*, also, does not conclude with a verification by the record, but merely with a verification: Fortesc. 339.

**Replication.]** To a plea of *nul tiel record*, in debt on record, the replication must state that there is such a record, and conclude *prout patet per recordum*, with a prayer that it may be inspected: Com. D. *Pleader*, 2 W. 13.

**PROOF OF RECORD.]** A record is proved, either by producing the record itself, or by an exemplification of it under the great seal, which is of itself a record, and needs no further proof, Gilb. Ev. 14, 10 Co. 93; or by an exemplification of it under the seal of the court (whether of a court at common law, or of one created by act of Parliament,) 2 Sid. 146, Gilb. Ev.

17, 19, 10 Co. 93, and see Hardw. 120; and which also needs no further proof, Gilb. Ev. 19, see *ante*, "Court of Chancery," "Foreign Courts," &c.; or by an examined copy, 10 Co. 92, *b.*, 2 Rol. 678, *l.* 45, R. Hardw. 119, according to circumstances: Arch. Pl. & Ev. 360. The effect of records, as judgments and convictions, &c., has already been considered, *ante*, 40, 382, 611. As to the effect of verdicts, writs, &c. see *post*, "Verdict," "Writ."

*Proof by record itself, under issue of Nul Tiel Record, &c.]* If *nul tiel record* be pleaded, and it be a record of the same court, the record itself must be produced: 2 Arch. Pr. B. R. 38; Tidd, 801. On an issue of *nul tiel record*, of the record of a superior court, as if, in an action in the C. P., a record of the K. B. be put in issue, as the inferior court cannot send for the record of the superior, a *certiorari* must be sued out with the *curitor*, directed to the Chief Justice of the K. B., requiring him to certify the record of the Court of Chancery, and the record being thereupon accordingly certified, an exemplification of it under the great seal is thence sent by *mittimus* to the inferior court, to be there used as evidence: see Gilb. 14, 15; 1 Arch. Pr. B. R. 139. A record of an inferior court, if directly put in issue, is proved by the tenor of the record, which may be obtained without the intervention of the Court of Chancery, and certified under a *certiorari* issued by the superior court: Tidd, 804.

In cases where the record is not directly put in issue by *nul tiel record*, it may be proved by an exemplification, or by an examined copy.

*Proof by Exemplification.]* An exemplification may be either under the great seal, or under the seal of the court in which the record is preserved. Exemplifications under the great seal may be obtained of any records of the Court of Chancery, or of any records which have been removed there by *certiorari*; but private deeds, exemplified under the great seal, will not be admitted in evidence: B. N. P. 227. Exemplifications of the records of a public court, under its own seal, are admissible, without proof of the genuineness of the seal: *Tboke v. Duke of Beaufort*, Sayer, 297. As to seal, &c. of foreign courts, *ante*, "Foreign Court."

*Proof by Examined Copies.]* An examined copy is evidence of every thing which is matter of record, except on the issue of [\*756] *nul tiel record*, when the record is complete. But copies must be proved by a witness who has examined them with the originals, line by line, or who examined the copy whilst the original was read to him, *Reid v. Margison*, 1 Camp. 469; but it is unnecessary for the persons examining to exchange papers, and read them alternately: *Gyles v. Hill*, *ib. n.*; *Rolf v. Dart*, 2 Taunt. 470. But, to make a copy evidence, it must be shown that the original came out of the custody of the officer of the court, and from the proper place of depositing the records; and this cannot be shown by the contents of the record itself: *Adamthwaite v. Synge*, 1 Stark. 183; 4 Camp. 372. In the case of ancient records, an examined copy is admissible, without proving examination: B. N. P. 228.

For making a copy evidence, the record must be complete, by having been delivered into the court in parchment, therefore the minute-book from which the entry of the proceedings at sessions is made; and from which the record is subsequently made up, is insufficient: *R. v. Bellamy*,

R. & M. 171. And so, the judgment-paper signed by the master is not evidence: B. N. P. 228. In a late case, where the plt. declared against an attorney for negligence, in not causing an application to be made to the court to set aside proceedings in an action brought against him, on the ground that he had never been served with process, in consequence whereof judgment was signed against him by default, and afterwards final judgment was sued out, and an execution issued thereon, it was held incumbent on the plt. to produce an examined copy of the whole record, to prove both the judgments, and that proof of the entry of the judgment by default in the prothonotary's book, and the inquisition, with the prothonotary's allocator, were not sufficient evidence of such judgment: *Godefroy v. Jay*, 1 M. & P. 236.

To make a copy of a record evidence, it must also be a copy of the whole record, as an omission of part might have the effect of altering the sense and import of the residue: *Gilb. Ev.* 23.

*Proof by Office-Copies.*] Office-copies, when used in the same court, and in the same cause, are equivalent to a record, but in other courts must be proved by examined copies: *per Ld. Mansfield*, 2 Burr. 1179; see "*Affidavit*," *ante*, 59; "*Chancery*," *ante*, 354-5.

*Proof by Copies made by proper Officers.*] An office-copy is also, in some cases, evidence, without proof of having been examined. If an officer, in whose custody the records are, be authorized by law to deliver out copies of records, &c., to the parties, his office-copy is evidence, without further proof. But it must be one of the duties of his office to make them out, and not a gratuitous act of his. Thus, an office-copy of a judgment is no evidence, for the officer is not authorized to make it, *ib.*, 25; but the chirograph of a fine is evidence, for it is the duty of the officer to make out copies of the records lodged with him of record, for the parties: *Plowd.* 110, *b.*; *Gilb. Ev.* 24; B. N. P. 229. So, an office-copy of a rule of court is evidence, for it is the duty of the clerk of the rules to make out a copy for the parties: 1 *Ld. Raym.* 745; 1 *Camp.* 102, 471, *n.* So, an office-copy of depositions sworn by a Judge is evidence, for it is the duty of the Judge's clerk to make out such copies: 1 *Camp.* 101. So, the indorsement of enrolment upon a deed enrolled is evidence, because the officer is authorized to make it: but if the deed be lost, an office-copy of the enrolment is no evidence, without proving it to have been examined, for it is no part of the officer's duty to make it: *Gilb. Ev.* 24, 25; *Arch. Pl. & Ev.* 361. See *supra*, as to what entries of authorized officers of parts of record will not be evidence.

As to the mode of proving verdicts, writs, inquisitions, rules of court, depositions, and proceedings in Chancery, affidavits, &c., see those respective titles.

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[\*757]

\*RECOVERY.—See FINE AND RECOVERY.

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RECTOR.—*Ante*, 462.



REGISTER.—See PUBLIC DOCUMENTS; *post*, TROVER.

### REJOINDER.

REJOINDERS are regulated by the same rules as those which govern pleas, with this further requisite, that they must support and not depart from the plea: 2 Saund. 189. When a replication, or a plea in bar in replevin, concludes to the country, the deft. can only demur or add the common *similiter*: Chit Pl. 563. When the replication concludes with a verification, the rejoinder usually denies it, and concludes to the country; but, when the rejoinder introduces new matter, it must, as in the case of a plea or replication, conclude with a verification: *ib.* If the deft. deny several matters alleged in the replication, the rejoinder may conclude to the country, without putting the matters in issue severally and distinctly: 1 Chit. Pl. 563.

#### *Precedents.*

##### SIMILITER TO REPLICATION CONCLUDING TO THE COUNTRY.

In the K. B. (or C. P., or Exchq.)

— Term 9 Geo. 4.

(Term when pleaded.)

And the said deft., as to the said replication of the said plt. to the said (second) plea of him, the said deft., and which the said plt. hath prayed may be inquired of by the country, doth the like.

##### COMMENCEMENT OF REJOINDER TO A SPECIAL REPLICATION. CONCLUSION TO COUNTRY.

And the said deft., as to the said replication of the said plt. the said (second) plea of him, the said deft., saith, that the said plt. ought not, by reason of any thing by him in that replication alleged, to have or maintain his aforesaid action thereof against him, the said deft. Because he saith that, &c. (*Here state the subject-matter of the rejoinder; and, if it deny the replication, conclude thus:*) And of this he, the said deft., puts himself upon the country, &c.

##### CONCLUSION WITH A VERIFICATION.

And this he, the said deft., is ready to verify; wherefore he prays judgment if the said plt. ought to have or maintain his aforesaid action thereof against him, the said deft. &c.

### RELEASE.

As to releasing witness, to render him competent, see *post*, "*Witness.*"

PLEADINGS AS TO.] A release may, in case, assumpsit, or debt on simple contract, be proved under the general issue, 3 Burr. 1363, 2 Camp. 558; and need not be pleaded as an estoppel to have [\*758] that effect: 1 B. & C. 704; 3 D. & R. 29: 5 B. & A. 606; 2 Taunt. 141. It may, however, be pleaded specially, and it is sometimes advisable so to do, to narrow the evidence on the trial. It is usual however, to plead the general issue in conjunction with it: Tidd, 707-8. A release must be pleaded in an action on a specialty, 1 Saund. 67, a. 1

Chit. Pl. 426; or in covenant, Com. D. *Pleader*, 2 b. 8; or in an action on a record, Bac. Ab. *Release*; or in trespass, 3 Burr. 1353. To the plea of release, the plt. may deny it, or reply *non est factum*, or that it was obtained by fraud or duress, and it is necessary to state the particulars of such fraud, 2 Burr. 944, 9 Co. 10, 1 Chit. Pl. 502, Com. D. *Pleader*, 3 M. 12; or, to a plea of release by a third person, plt. may reply, he did not release: 2 Bulst. 55. [To a plea of release by the plaintiffs to a co-contractor with the defendants, the plaintiffs replied *non est factum*, to which the defendants rejoined, "that the said deed is the deed of the plaintiffs," on which issue was joined:—*semble*, that this issue would be supported by the production of the release in a cancelled state, it having been cancelled by the release after the plea was pleaded, but before issue joined: *Todd v. Emly*, 11 Mees. & W. 1.]

### Precedents.

See forms of plea of release in assumpsit, 3 Chit. Pl., 930; replication thereto, *non est factum*, *ib.*, 1156; replication that release was obtained by fraud, *ib.*; pleas of release *puis darrein continuance*, *ib.*, 1238.

EFFECT OF, *with Reference to Form and Terms of Release.*] A release should be under seal, in which case no consideration need be stated: Co. Lit. 264, b. It may either be of the whole or part of the claim: 2 Rol. Ab. 413; Bac. Ab. *Release*, (A.) However, contracts not under seal may, *before breach*, be released by parol consent, or by instruments not under seal: Cro. Car. 383; 8 Taunt. 596; 2 Moo. 660; see *ante*, "*Composition*."

Any words whereby the party renounces his claim, or discharges the debtor, are sufficient: the word release is the proper term to use; but a covenant not to sue, 1 T. R. 446, or an acknowledgment that the party is satisfied, produces the same effect: Com. D. *Rel. A.* 1 Cro. Eliz. 352, &c. A release of all manner and causes of action, in the usual terms, will discharge any *inchoate* right of action or existing debt, as money to be paid at a future time by specialty or simple contract: 2 Stark. 240. Cro. Jac. 300; Com. D. *Rel. (E.)* Bac. Ab. Where a release contains introductory matter, explaining the facts, the release, though in general terms, must be controlled by the previous recital, and the court will give such an effect to it as may best consist with the manifest intention of the parties and the real justice of the case: *per Abbott, C. J., Lampon v. Corke*, 5 B. & A. 609; 2 B. & B. 38; 2 M. & S. 423. A covenant that the party "shall and will release," is no release: 1 B. & A. 8. In general, where a simple security for a debt is given, it is extinguished by a specialty security, if the remedy given by the latter is co-extensive with that which the creditor had upon the former; but, where the deed is intended as a further security, and reciting an *existing* security given by the debt. as a surety, it has been held, that it could not have been intended to operate as an extinguishment of all claims upon him, as it appears that the parties intended the original security to remain in force: *per Bayley, J., Troopenny v. Young*, 3 B. & C. 210-1; 5 D. & R. 259; 2 B. & B. 38.

*With Reference by whom made.*] A release by an agent will some-

times do, where the agent is duly authorized: *ante*, 733. A release by one of several joint creditors, who is one of the plts. on the record, is competent to give it, on the principle that it is a discharge of the debt: 2 Camp. 561; 3 B. & C. 422; Bac. Ab. *Rel.*; 3 Bulst. 29. But, in the case of trustees, or where a nominal plt. fraudulently releases the action, to the prejudice of the party beneficially interested, "a court of law will avoid it by equitable interference," and will admit evidence to show that it was a fraudulent transaction: 3 B. & C. 421; 5 D. & R. 290. Where husband\* and wife lived separate, under a deed that she should [\*759] enjoy her separate property, &c., all effects which she might acquire, &c., by any gift, grant, representation, &c., and she afterwards sued as executrix of R. M., and the husband was joined for conformity, the court set aside a release; and *Holroyd, J.*, said, "I think that this release is clearly in fraud of the deed of separation:" 4 B. & A. 422. However, a clear case of fraud and injustice must be made out to induce the court to set aside the release, where the party has a strict legal right so to do: 7 Taunt. 421.

*With Reference to whom made.]* A general release to one of several joint debtors is a release to all; and that, even in cases where their undertaking is several; as well as joint, on the principle of the release's being a satisfaction of the debt, and there is but one duty extending to all the debtors; therefore, a discharge of one is a discharge of all: Bac. Ab. *Rel. G.*; Co. Lit. 232; Rol. Ab. But a release in a covenant not to sue will not have this effect, but "will be construed so as to give effect to it, according to the particular purpose for which it was made:" 2 Show. 47; 4 M. & S. 423; 8 T. R. 168; 3 B. & C. 212; 5 D. & R. 259. Therefore, a release given to one of two partners, with a provision that it should not prejudice the plt. as to any claim which he might have against another partner, and that he might, notwithstanding the release, sue them jointly, or the other partner separately, a joint action having been commenced, and the release pleaded, to which plt. replied, that the party released was only joined for the purpose of recovery against the other partner, on demurrer, the court held the replication good: 2 B. & B. 38; and see *Perfect v. Musgrove*, 11 Price, 118; 2 B. & A. 210; 4 B. & C. 507, and note; 5 D. & R. 259. A deed "*inter partes*" cannot operate as a release to strangers, although it contain apt words of release: 3 M. & S. 308; Bac. Ab. *Release. (G.)*

*PROOF AS TO.]* The release should be produced duly stamped and proved by the subscribing witness, who should be subpoenaed; and see further as to evidence of deeds, *ante*, 422, which will here reply. A release may be sometimes established by presumptive evidence: *Washington v. Brymer*, Peake Ev. 422; 3 Stark. Ev. 1291; Tidd. 18; and see *ante*, 718, as to presumption of payment. Where a fraudulent release is set up in answer to a just debt, it would, it seems, be both inconvenient and inconsistent to prevent the plt. from defeating the instrument, merely because the party might obtain a remedy in equity; and when it is very possible that a court of equity might, the party being guilty of fraud, denying on his oath, again send the plt. to law, to have his case tried by a jury. The party may, by recourse to equity, obtain an answer from his adversary on oath, an advantage which he could not obtain at law; but,

if he chose to waive that advantage, there seems to be no reason why he should not at once impeach the deed for fraud by evidence upon the trial: 3 Stark. Ev. 1294. [A court of law has no jurisdiction to set aside a release which is good in law; but, in the exercise of its equitable jurisdiction, it may interfere to prevent a defendant from pleading a release, where it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and where the defendant himself is a party to the fraud. An action having been brought against the defendant for illegally pledging certain tobacco, and the defendant having pleaded a release given to him by one of the parties interested in the tobacco, the court refused to set aside the plea, the releasor having an immediate interest in the money sought to be recovered, but no fraud being shown: *Phillips v. Claggett*, 11 Mees. & W. 84. Whether a court of equity would, under such circumstances, set aside the release, is made a question in this case.]

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RENT.—*Post*, USE AND OCCUPATION.

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[ \*760 ]

## \*REPLEVIN.

NATURE OF ACTION, AND WHEN IT LIES IN GENERAL, 760.

FORM OF PLEADINGS, 761.—*Declaration*, *ib.*—*Avowry*, *ib.*—*Plea in Bar*, 762.

PRECEDENTS, 763.

EVIDENCE, 767.—*Under non cepit*, *ib.*—*Under non dimisit and non tenuit*, *ib.*—*Under rien en arrear*, 768.—*Under traverse of Deft.'s being Bailiff*, *ib.*—*Under Avowry for Distress*, damage feasant, *ib.*

COMPETENCY OF WITNESSES, 769.

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*Nature of the Action, and when it lies.*

REPLEVIN is the remedy to recover damages for the taking away a person's goods. The plt. can only recover damages for the taking of the goods, and for the detention till the time of the replevin, and not the value of the goods themselves: 1 Saund. 347, *b. n. 2*; Lutw. 1150-1. Replevin lies in all cases where there has been a wrongful taking of personal chattels, where the party had in them either absolute or special property, and not merely in the case of a wrongful distress, 3 Bl. C. 146, 2 Sel. N. P.; though now it is seldom adopted but for distress for rent, damage feasant, poor's rate, &c.: Com. D. *Action*, M. 6. Where there has been a distress for rent, replevin lies only where no sum whatever has been in arrear, or where there has been a tender of all that was in arrear, or the like, where the original seizure was totally unjustifiable: 5 T. R. 248, *n. c. 3* B. & P. 348; *ante*, 437. [Replevin lies for the wrongful *detainer* of goods taken under a *lawful* distress; and a plea, that after the taking for a rent-service and before impounding, the rent and costs were tendered, held

good: *Evans v. Elliot*, 6 Nev. & M. 606; and 5 Ad. & Ell. 142.] If any sum, however small, were due, and the distress were for a greater sum, or excessive, or otherwise irregular, the remedy must be by action on the case: *ante*, 437. If a superior court award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution; and, if any person should pretend to take out a replevin, the court would commit him for a contempt of their jurisdiction, *Gilb. Repl.* 161, *Willes*, 672, *n. b.*, 2 Str. 1184, 1 Chit. Pl. 147; and where goods are taken by way of levy, as for a penalty on a conviction under a statute, it is generally in the nature of an execution, and, unless replevin be granted by the statute, this action will not lie, the conviction being conclusive, and its legality not questionable in replevin, *Com. D. Action*, *M.* 6. *Willes*, 673, *n. b.*; but, where a special jurisdiction is given to justices, &c., and they exceed it, in some cases replevin lies: *Willes*, 672, *n. b.*; 1 Chit. Pl. 147.

The action can only be maintained for the taking and detaining of *personal chattels*; therefore, fixtures cannot be recovered, 4 T. R. 504; nor, it appears can money, *Moo.* 394, unless perhaps in a bag or the like. It is necessary that the plt. in replevin have a general or special property in the goods taken, or he cannot maintain the action, 10 Mod. 25, *Co. Lit.* 145, *b.*, and he must also have the immediate right of possession: 52, *b.*, *B. N. P.* 7 T. R. 9. It does not lie where the interest is in reversion: *ib.*, 4 T. R. 504. Executors may recover in this action, where the taking was in the life of their testators: *B. N. P.* 54. Several persons cannot join their several rights in this action, but each must have a separate replevy, *B. N. P.* 52; but joint tenants or tenants in common may: *Co. Lit.* 145. A husband may replevy, where the goods of the wife were taken whilst sole: *B. N. P.* 52, *b.* Replevin is, in many cases, more preferable than trespass, because the plt. may present, by his pleas in bar, several answers to the deft.'s defence, which he cannot do in trespass: see *post*, 762, as to pleas, &c.

\*Form of Pleadings.

[\*761]

*Declaration.*] The declaration may be entitled of the term of the return of the *re. fa. lo.*, 3 T. R. 624, or, as it would seem, of that in which the declaration is delivered, 5 Taunt. 774; 1 Marsh. 341, *s. c.*; and it will be irregular, if entitled of an intermediate term; and deft. may sign judgment, though he cannot set aside the proceedings, 1 Wils. 242. The *venue*, is local, and must be laid in the county where the cattle were taken, as the place is material and traversable, except when the cattle were driven into another county, in which case the plt. has his election to bring his replevin in either county, and may lay his *venue*, in the county in which the replevin is, *Doc. Plac.* 315, as the wrong continues wherever the deft. has cattle: *per Wilmot, C. J.*, 2 Wils. 355. The declaration charges the deft. with having taken the goods of the plaintiff, and unjustly detained them against sureties and pledges, until, &c.; 2 H. Bl. 548. The *precise* day of the taking need not be stated, though it is usual so to do. The plt. may in the same declaration count for several takings, part at one day and place, and part at another day and place: *F. N. B.* 68. It is necessary to allege the *place* where the distress was, as well as the *ville* or *parish*, *Cro. Eliz.* 896, *Hob.* 16; otherwise the deft. may de-

mur, 2 Wils. 354; but the omission is cured by pleading over, or after verdict. The place and ville, or parish, are material, and traversable, 1 Saund. 347, *n.* 1, Hob. 16, Cro. Eliz. 896, Moo. 678, 1 Brownl. 176, 1 Sid. 9, 10, 20, Carth. 186; and the deft. may plead *cepit in alio loco*; and, as the place must be specially mentioned, no new assignment is permitted: Freem. 238. Where cattle or goods are taken in two places, it ought to appear what number was taken in each: Lit. Rep. 37; Com. D. *Pl.* 3 *K.* 10. The goods taken must be described with certainty, though, indeed, the same strictness does not prevail as formerly: 2 Saund. 74, *b.* A declaration for taking divers goods and chattels of plt. is bad for uncertainty; and, though judgment pass by default for plt., the defect is not cured by the Stat. of Jeofails: 4 Anne, *c.* 16; 7 Taunt. 642; 1 Moo. 386, *s. c.* The property should be stated to belong to the plt. Rep. tem. Hard. 118; 2 Str. 1023. If the declaration be by husband and wife, the interest of the wife in the goods must appear, 2 N. R. 405, and be particularly described; though it is not necessary to mention their value, yet their number should be stated; otherwise, how is the deft. to obtain judgment of *retorno habendo*? 1 Moo. Rep. 386. Where the property belongs to several persons, having distinct interests, they cannot join: Com. D. *Pl.* 3 *K.* 10. The value of the goods, &c. need not be stated, 2 Saund. 320, unless the declaration be in the *detinet*, which is now very unusual.

*Avowries, &c.*] The general issue in replevin is *non cepit modo et forma*, by which the deft. puts in issue not only the taking, but also the taking in the place alleged in the declaration: 1 Str. 507. Where the deft. wants a return of the cattle, he should plead that he took the cattle in some other place, describing it, and traverse the place laid in the declaration, and should avow or make cognizance, stating the cause for which he distrained: 1 Saund. 347, *n.* 1. Where the deft. neither took the cattle in the place named, nor had them afterwards, he should plead *cepit in alio loco*, and he will thereby be entitled to have them returned: 1 Vent. 127; B. N. P. 54. Where the distress is for poor's rates, the deft. may plead not guilty, and give the cause of taking in evidence under that issue: 43 Eliz. *c.* 2, *s.* 19. And so, in the case of sewer's rates, a general issue is given by 23 Hen. 8, *c.* 5, *s.* 19, and under the bankrupt laws: 1 Jac. 1, *c.* 5, *s.* 16. If the deft. says he well avows, instead of well acknowledges, the caption, no objection can be taken: Cro. J. 373. An avowry for damage feasant is not governed by the provisions of any statute; [\*762] but its \*proceedings are wholly at common law; it is most frequently made use of by a freeholder, copyholder, or by a tenant for years, Wilkinson on Replevin, 59; and the deft. must therefore avow or make cognizance with particularity: 2 B. & P. 359; 2 Saund. 284, *d.*; 1 *ib.* 347. But the 11 Geo. 2, *c.* 19, *s.* 22, gives a general avowry, in cases of distresses for rent service. [But see *Philpott v. Dobbinson*, 3 M. & P. 320; 6 Bing. 104.] It is not incumbent, however, on the deft. to pursue this course, and it is advisable in some cases to set out the title specially, in order that a traverse of a particular part of it may be taken, that the parties may take on a particular point: 2 Saund. 284, &c. Under a distress, a rent charge is not within the act, 1 B. & P. 213, 1 N. R. 56; [*contra*, *Short v. Hubbard*, 2 Bing. 349; 9 Moore, 667; 10 Moore, 107;] and it is necessary that the deft. avow specially, where he had made the distress after the goods had been removed, or for rent after the term

had expired: 8 Anne, c. 14, s. 2, 6, 7; 2 Saund. 284, a. b.; *Furneaux v. Fotherby*, 4 Camp. 135. In an avowry for rent, the party must not only state a title, but he must show a title; but, in an avowry for damage feasant, it is sufficient if he merely state generally that he was seized: 1 Ld. Raym. 333. [It is not necessary that an avowry for rent should allege in precise terms, that the plaintiff was tenant to the avowant: if the fact can be collected from the whole of the avowry it is sufficient: *Innes v. Colquhoun*, 5 M. & P. 63; 7 Bing. 265.] A landlord may distrain and avow for rent in arrear, though the possession be in an assignee of his tenant: 8 East, 316, *note*. In an avowry for rent, though more be alleged to be due than is due, yet will the deft. be entitled to so much as he can prove to be due: *Forty v. Imber*, 6 East, 434; 5 T. R. 248. If the whole rent be in arrear, the deft. may avow for only part; but, if part only be in arrear, the deft. cannot avow, unless he can prove he has received an equivalent for the remainder: 1 Saund. 201.

[The defendant cannot avow for rent in arrear from A. B., and also plead property in the goods as the assignee of A. B., under the bankrupt law: *Emery v. Mucklow*, 4 M. & Scott, 263.]

*Pleas in Bar.*] The plt. cannot, in this action, reply *de injuria*: Finch, 396; 1 B. & P. 76. But, by 4 Anne, c. 16, he may, in general, with leave of the court, reply several pleas in bar. To an avowry, or recognizance for rent, the plt. cannot plead *nil habuit in tenementis*; he may, however, deny the demise or tenancy as stated, which denial, if the avowant claims under a derivative title, and has never received rent, will put such title in issue: 2 Wils. 208; 5 T. R. 4; Com. D. Pl. 3 K. 16, 20, b. And plt. may plead that no part of the rent was in arrear, *ib.*, concluding each to the country, 1 Ld. Raym. 641; 1 Saund. 103. b.; Com. D. Pl. 3 K. 20; or he may plead payment of rent to a ground landlord, or prior incumbrancer, or of land or property tax, though he cannot avail himself of any other set-off, 4 T. R. 511, 6 Taunt. 524, Doug. 624-5, 2 Chit. Rep. 521, 6 Taunt. 524, 2 Bing. 94: and, as to pleas of payment of ground rent, see 1 B. & B. 37, 3 Moo. 287, s. c.; see 3 B. & A. 516; as to property tax, 1 B. & A. 123. So, a party may plead a former distress, and satisfaction under it, 5 Moo. 542, 4 *ib.* 409, 1 B. & A. 157; eviction is also a good plea in bar. To an avowry or cognizance by a freeholder, or a copyholder, or his tenant, for a *distress damage feasant*, the plt. may deny his title, and conclude to the country, or state his own title specially, and conclude with a traverse, though the former seems preferable, 2 Saund. 206, a. n. 22, 1 Saund. 103, b., 1 Co. 63-4, 1 Chit. Pl. 511; or plt. may state a demise to him from the deft., or a right of common in the *locus in quo*, either as a freeholder or a copyholder, or as his tenant, Com. D. Pl. 3 K. 24, prescribing, if by a freeholder, *ib.*, Com. D. Pl. 3 K. 24, 1 Saund. 348, n. 10, or, if by a copyholder, alleging a custom within the manor, either for all copyholders within the manor, or for the tenant of the deft.'s land in particular, *ib.*, 1 Saund. 348, n. 8, 11, 1 Chit. Pl. 511; or the plt. may plead a right of way, Com. D. Pl. 3 K. 25; or, in excuse for the cattle having been in the *locus in quo*, he may plead defect of fences, which the deft. ought to have repaired: 2 Saund. 284, c. 289, n. 7; 2 H. Bl. 527. So, admitting that the cattle trespassed in the *locus in quo*, the plt. may traverse that the distress was whilst the cattle were *damage feasant*, 3 Esp. Rep. 95, or may plead a tender before the impounding,

Com. D. *Pl.* 3 K. 23, B. N. P. 60; and, in the case of a distress *damage feasant*, the plt. may plead in bar, that the avowant, after making the distress, used the cattle, or otherwise became a trespasser \**ab* [\*763] *initio*: Com. D. *Pl.* 3 K. 20; 1 Chit. *Pl.* 512. To a cognizance the plt. may traverse the deft.'s being bailiff: 1 Ld. Raym. 641; Com. D. *Pl.* K. 14. If the deft. has pleaded *cepit in alio loco*, with an avowry or cognizance for a return, the plt. must take issue on the traverse of the place, or amend his declaration, for he cannot traverse any matter in the avowry or cognizance: but, if the deft. had them in the place mentioned in the declaration, though he took them elsewhere, the plt. may safely take issue: 1 Saund. 347, n. 1; *ante*, 761. [The plaintiff may, as just stated above, plead a demise to him from the avowant; and, a plea to an avowry for rent, that the avowant demised and transferred the premises to the plaintiff for the residue of the term, and had no interest in the reversion, was held good; and a replication, that, upon a reference, the arbitrator had by his award given a power of distraining, without averring that such power was a matter in difference, or that he had authority to confer it, was held ill: *Pascoe v. Pascoe*, 3 Bing. N. S. 898.]

### Precedents.

#### DECLARATION IN REPLEVIN IN K. B. OR C. P.

In the K. B. (or C. P.)

Trinity Term, 9 Geo. 4.

(See *ante*, 761, as to title.)

\_\_\_\_\_ (*local*) to wit. C. D. (the deft. in this suit) was summoned to answer A. B. (that plt. in this suit) of a plea, wherefore he took the cattle, goods, and chattels, (or, "the corn,") (*according to the taking*) of the said plt., and unjustly detained the same against sureties and pledges, until, &c.; and thereupon the said plt., by E. F., his attorney, complains, for that the said deft., on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, (*ante*, 761,) in the parish of \_\_\_\_\_, (*ante*, 761,) in the county of \_\_\_\_\_, in a certain dwelling-house there (*according to the fact, ante*, 761,) (or, *if on land*, "in a certain close, there called \_\_\_\_\_,") took the cattle, goods, and chattels, to wit, (*ante*, 761; as to describing standing corn, see 2 Chit. *Pl.* 844, n.) of him, the said plt. (*ante*, 761,) of great value, to wit, of the value of £—, (*ante*, 761,) and unjustly detained the same, against sureties and pledges, until, &c.; wherefore the said plt. saith that he is injured, and hath sustained damage to the amount of £—, (*insert enough*;) and therefore he brings his suit, &c.

See precedent of declaration in replevin in the county court, 2 Chit. *Pl.* 854.

#### PLEA OF NON CEPIT.

In the K. B. (or C. P.)

Trinity Term, 9 Geo. 4.

C. D. } And the said deft., by E. F., his attorney, comes and defends the wrong and  
 A. B. } injury, when, &c., and says that he did not take the said cattle, goods, and chattels,  
 in the said declaration mentioned, or any or either of them, or any part thereof,  
 in manner and form as the said plt. hath above thereof complained against him. And  
 of this he, the said deft., puts himself upon the country, &c.

#### COMMENCEMENT OF AN AVOWRY.

And the said deft., by \_\_\_\_\_, his attorney, comes and defends the wrong and injury, when, &c., and well avows the taking of the said cattle, goods, and chattels, in the said declaration mentioned, in the said close and dwelling-house (*as in declaration*,) in which, &c., and justly, &c., because he says that, &c.



COMMENCEMENT OF A COGNIZANCE.

And the said deft., by ———, his attorney, comes and defends the wrong and injury, when, &c., and, as the bailiff of G. H., well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house in which, &c., and justly, &c., because he says that, &c.

COMMENCEMENT OF AN AVOWRY AND COGNIZANCE.

And the said defts., by ———, their attorney, come and defend the wrong and injury, when, &c., and the said C. D., in his own right, well avows, and the said E. F., as bailiff of the said C. D., well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house in which, &c., and justly, &c. Because they say that, &c.

CONCLUSION OF AN AVOWRY OR COGNIZANCE.

And this he, the said deft., is ready to verify; wherefore he prays judgment and a return of the said goods and chattels, together with his damages, &c., according to the form of the statute in such case made and provided, to be adjudged to him, &c.

\*AVOWRY OR COGNIZANCE FOR RENT.

[\*764]

(*Commencement as ante, 763.*) Because he says that the said plt. (or, "one C. D.," for a long time, to wit, for the space of ——— years next before, and ending on the ——— day of ———, A. D. ———, and from thence until, and at the same time, when, &c., held and enjoyed the said dwelling-house, in which, &c., with the appurtenances, as tenant thereof, to the said deft. (or, "G. H.," by virtue of a certain demise thereof to him, the said plt. (or, "the said C. D.,") theretofore made, at and under a certain yearly rent, to wit, the yearly rent of £—, payable quarterly, on, &c. (*the days of payment*), in every year, by even and equal portions, and because the sum of £—, of the rent aforesaid for the said space of ———, ending, as aforesaid, on the said ——— day of ———, in the year aforesaid, and from thence until and at the said time, when, &c., was due and in arrear from the said plt. to the said deft. (or, "E. F.," in a *cognizance*), he, the said deft., well avows (or, if a *cognizance*, "as bailiff of the said E. F., well acknowledges,") the taking of the said goods and chattels in the said dwelling-house, in which, &c., and justly, &c. as for and in the name of a distress for the said rent, so due and in arrear to the said deft. (or, "E. F.,") as aforesaid, and which is still in arrear and unpaid. And this, &c. (*Conclude with a verification, as ante, 763.*)

AVOWRY BY A FREEHOLDER, UNDER A DISTRESS DAMAGE FEASANT.

(*Commencement as ante, 763.*) Because he saith that the said place in which, &c., now is, and on the said time, when, &c., was, the close, soil, and freehold of him, the said deft., and because the said cattle, at the said time, when, &c., were in the said place in which, &c., eating up the grass there then growing, and doing damage there to the said deft., he, the said deft., well avows the taking of the said cattle in the said place in which, &c., and justly, &c., as for and in the name of a distress for the said damage so there done and doing, as aforesaid. And this, &c. (*Conclude with a verification, as ante, 763.*)

THE LIKE BY A TENANT, FROM YEAR TO YEAR.

(*Commencement as ante, 763.*) Because he says that E. F., before the said time, when, &c., and at the time of the making of the said demise hereinafter mentioned, was seized of and in the said place which, &c., with the appurtenances, in his demesne as of fee; and, being so seized, he, the said E. F., before the said time when, &c., to wit, on, &c., at, &c., aforesaid, demised the said place in which, &c., with the appurtenances, to the said deft., to have and to hold the same to the said deft. for one whole year from thence next ensuing, and fully to be complete and ended, and so from year to year, as long as they, the said E. F. and deft., should respectively please. By virtue of which said demise he, the said deft., afterwards, and before the said time, when, &c., to wit, on, &c., last aforesaid, entered into the said place in which, &c., with the appurtenances, and became, and until and at the said time when, &c., was possessed thereof. And, because the said cattle in the said declaration mentioned, at the said time, when, &c., were wrongfully

in the said place in which, &c., treading down and depasturing the grass there then growing, and doing damage there to the said deft., he, the said deft., well avows the taking of the said cattle in the said place, in which, &c., and justly, &c., as for and in the name of a distress for the said damage so there done and doing, as aforesaid. And this, &c. (*Conclude as ante*, 763.)

See form of plea of property in deft., or a stranger, 3 Chit. Pl. 1044; *cepit in alio loco*, with avowry for return, *ib.*, 1045; that deft. took the cattle damage feasant in another close, *ib.*, 1046; see another form of common avowry for rent, *ib.*, 1048; avowry where part of the rent has been satisfied, *ib.*, 1048, 1049, 1050; cognizance, where rent was payable at so much per acre, *ib.*, 1051; avowry where goods were distrained under 8 Anne, c. 14, *ib.*; avowry under distress for rent, on common appurtenant, *ib.*, 1052; avowry for rent, where goods had been fraudulently removed, *ib.*, 1053; cognizance, as bailiff of an executor, under 32 H. 8. c. 37, *ib.*, 1055; by one tenant in common for rent due to him, *ib.*, 1056; and cognizance, as bailiff of the other tenant, *ib.*, 1057; avowry for poor's rate, *ib.*; avowry for distress damage feasant by a copyholder, or his tenant, *ib.*, 1059; avowry for distress damage feasant by commoners, *ib.*

## [\*765]

## \*PLEA IN BAR OF SIMILITER TO NON CEPIT.

And the said plt., as to the said plea of the said deft., by him first above pleaded, and whereof he hath put himself upon the country, doth the like.

## COMMENCEMENT OF A PLEA IN BAR TO AN AVOWRY.

And the said plt., as to the said avowry of the said deft., saith, that the said deft., by reason of any thing by him in that avowry above alleged, ought not to avow the taking of the said cattle, goods, and chattels, in the said place in which, &c., and justly, &c., because he saith that, &c.

## THE LIKE TO A COGNIZANCE.

And the said plt., as to the said cognizance of the said deft., saith, the said deft., by reason of any thing by him in that cognizance above alleged, ought not, as bailiff of the said E. F., to acknowledge the taking of the said cattle (or, "goods and chattels,") in the said place in which, &c., and justly, &c., because he saith that, &c.

## THE LIKE TO AN AVOWRY AND COGNIZANCE.

And the said plt., as to the said avowry and cognizance of the said deft., and E. F., by them first above made, saith, that, by reason of any thing therein alleged, the said deft., in his own right, ought not to avow, and the said E. F., as bailiff of the said deft., ought not to acknowledge, the taking of the said cattle, goods, and chattels, in the said place in which, &c., and justly, &c., because he saith, that, &c.

## COMMENCEMENT OF A SECOND PLEA IN BAR, BY LEAVE, &amp;c.

And, for a further plea in this behalf to the said first avowry (or, "cognizance") of the said deft., the said plt., by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said deft., by reason of any thing in his said avowry (or, "cognizance") alleged ought not to avow (or, "as bailiff of the said E. F., ought not to acknowledge") the taking of the said cattle, goods, and chattels, of the said plt., and the said place in which, &c., and justly, &c., because he saith, that, &c.

## CONCLUSION TO COUNTRY.

And this he, the said deft., prays may be inquired of by the country, &c.

## CONCLUSION WITH A VERIFICATION.

And this he, the said plt., is ready to verify; wherefore, inasmuch as the said deft. hath above acknowledged the taking of the said cattle, goods, and chattels, in the said place, in which, &c., he, the said plt., prays judgment and his damages, by reason of the taking and unjustly detaining the same, to be adjudged to him, &c.

THE LIKE TO AN AVOWRY AND COGNIZANCE.

And this he is ready to verify; wherefore, inasmuch as the said deft., in his own right, hath avowed, and the said E. F., as bailiff of the said deft., hath acknowledged, the taking of the said cattle, goods, and chattels, in the said place in which, &c., he, the said plt., prays judgment and his damages, by reason of the taking and unjustly detaining thereof, to be adjudged to him, &c.

PLEA IN BAR, DENYING THE DEMISE.

(*Commencement, as supra.*) Because he saith that the said plt. (or, "E. F.") did not hold or enjoy the said dwelling-house in which, &c., with the appurtenances, as tenant thereof to the said deft. (or, "the said G. H.") under the said supposed demise thereof in the said avowry (or, "cognizance") mentioned, in manner and form as the said deft., hath above in his said avowry (or, "cognizance") in that behalf alleged; and this he, the said plt., prays may be inquired of by the country, &c.

PLEA IN BAR. NO RENT IN ARREAR.

(*Commencement, as supra.*) Because he saith, that no part of the said supposed rent, in the said avowry (or, "cognizance") mentioned, was or is in arrear, from the said plt. to the said deft. (or, "G. H.") in manner and form as the said deft. hath, in his said avowry (or, "cognizance," in that behalf alleged; and this he, the said A. B., prays may be inquired of by the country, &c.

PLEA IN BAR, THAT DEFT. WAS NOT BAILIFF.

(*Commencement, as supra.*) Because he saith, that the said deft., at the same time, when, &c., was not the bailiff of the said E. F., in manner and form as he, the said deft., hath above in his said cognizance in that behalf alleged; and [\*766] this he, the said plt. prays may be inquired of by the country, &c.

PLEA IN BAR. TO AVOWRY DAMAGE FRASANT, BY FREEHOLDER, DENIAL OF HIS TITLE.

(*Commencement as ante, 765.*) Because he saith, that the said place in which, &c., now is, and at the said time when, &c., was not the close, soil, and freehold of the said deft. (or, "G. H.") in manner and form as the said deft. hath above, in his said avowry (or, "cognizance," in that behalf alleged; and this he, the said plt., prays may be inquired of by the country, &c.

PLEA IN BAR. TO AVOWRY DAMAGE FRASANT BY TENANT, TRAVERSE OF THE DEMISE.

(*Commencement as ante, 765.*) Because he saith that the said E. F., in the said avowry (or, "cognizance") mentioned did not demise the said place, in which, &c., to the said deft., in manner and form as the said deft. hath above in his said avowry in that behalf alleged; and this, he, the said plt., prays may be inquired of by the country, &c.

PLEA IN BAR. TO AN AVOWRY DAMAGE FRASANT BY FREEHOLDER OR LEASE-HOLDER, THAT DEFT. DEMISED LOCUS IN QUO TO PLT.

(*Commencement as ante, 765.*) Because he saith, that long before the said time, when, &c. to wit, on, &c., at, &c., aforesaid, he, the said deft., demised the said place in which, &c., with the appurtenances, to the said plt., to have and to hold the same to the said plt. from the — day of —, in the year last aforesaid, for one year then next following, and fully to be complete and ended, and so from year to year, for so long time as the said deft., and plt. should respectively please; by virtue of which said demise, he, the said plt., long before the said time when, &c., to wit, on, &c., last aforesaid, entered into the said place in which, &c., with the appurtenances, and became, and until and at the said time, when, &c.; was possessed thereof; and, being so possessed thereof, he, the said plt., afterwards, and during the continuance of the said tenancy, and before the said time when, &c., to wit, on, &c., put the said cattle, in the said declaration mentioned, into the said place, in which, &c., to feed and depasture on the grass there then growing, and which said cattle were lawfully in and upon the said place in which, &c., feeding and depas-

turing on the grass there then growing from thence until the said deft., of his own wrong, at the said time when, &c., during the continuance of the said tenancy, took the said cattle in the said declaration mentioned, in and upon the said place in which, &c., and detained the same against sureties and pledges, until, &c., in manner and form as the said plt. hath above complained against him the said deft. And this, &c. (*Conclude as ante*, 765.)

See form of a plea in bar of payment of rent to ground landlord; 3 Chit, Pl. 1190. No rent in arrear as to part, and tender as to residue, *ib.* 1191; written, *ib.* 1192; plea in bar to cognizance for arrear of annuity, that account was void, for defective memorial, &c.: *ib.* 1192, 3, 4. Plea in bar to avowry for distress damage feasant, defect of fences, *ib.* 1196; the like, stating deft.'s obligation to keep a gate shut, *ib.* 1197; the like, *locus in quo*, adjoining a common, *ib.* 1198; that plt. had a right of common in *locus in quo*, *ib.* 1199; tender of amends before impounding, *ib.*; denial of right of common: *ib.* 1200.

#### REPLICATION OF SIMILITER.

And the said deft. as to the said plea in bar of the said plt., by him (first) above pleaded, and which he hath prayed may be inquired of by the country, doth the like.

#### COMMENCEMENT OF A SPECIAL REPLICATION.

And the said deft., as to the said plea in bar of the said plt. to the said (first) avowry of him the said deft., saith, that he, by reason of any thing by the said plt. in that plea above alleged, ought not to be barred from avowing (or, "acknowledging") the taking of the said cattle, goods, and chattels in the said declaration mentioned in the said place, in which, &c., and justly, &c., because he saith that, &c. (or, if the replication merely re-assert matter alleged in the avowry or cognizance, say, because "as before" he saith, &c. Here state the subject-matter of the replication, and, if it be merely in denial of the plea in bar, conclude to the country as follows:.) And of this, he, the said deft., puts himself upon the country, &c.

#### CONCLUSION WITH A VERIFICATION.

[\*767] \*And this he, the said deft., is ready to verify; wherefore, as before, he prays judgment, and a return of the said cattle, goods, and chattels, together with his damages, &c., according to the form of the statute in such case made and provided, to be adjudged to him, &c.

See form of replication, denying tender of rent, *ib.* 1228; or stating a subsequent demand, *ib.* 1229; stating a notice to quit, *ib.*; to plea of defect of fences, denial of obligation to repair, *ib.* 1230; denial of defect of fences, *ib.*; traversing right of common, *ib.* 1231.

#### Evidence.

The evidence must depend on the issue taken by the pleadings. Where the taking is admitted by the deft., by no plea of *non cepit*, the plt. need not produce evidence of that fact; but the course is for the plt.'s counsel to open the pleading, and the deft.'s counsel to begin, and to state and call witnesses to support his case.

*Proof under Non Cepit.*] The effect of this issue is to deny the taking the property in the place stated in the declaration; the plt. is, therefore, bound to prove that fact. If he fail in proving a taking, or having the property in the place stated, he will be nonsuited: Cowp. 476. It is sufficient to show that the deft. had the goods in his possession in the place alleged, for the wrongful taking is continued in every place in which he

afterwards detains them. As to proving that deft. took the goods, some party present on the occasion should be subpœnaed. If the deft. took the goods in his own right, the bailiff, or the party assisting in the distress, should be served with a *subpœna duces tecum*, to produce his authority. If he acted as bailiff, he should have a notice served on him to produce the authority: see *post*, "Secondary Evidence." Any admissions made by deft. should be proved. If this issue be found for the deft., it merely excuses him from damages, but does not entitle him to a return of the property: *Walton v. Kersop*, 2 Wils. 354. As to what plea will entitle deft. to such return, see *ante*, 711-3.

*Proof under Non Dimisit or Non Tenuit.*] This avowry puts in issue the demise and tenancy, as stated in the avowry or cognizance. If deft. only shows an agreement for a lease, or a lease at no specified rent, it will not suffice: *Dunk v. Hunter*, 5 B. & A. 322. But though the plt. holds under an agreement for a lease, in which the amount of the rent is not stated, yet, if he enters on the premises and pays rent, he becomes tenant from year to year at that rent, and an avowry, stating the terms of the tenancy accordingly, will be sufficient: *Knight v. Bennett*, 3 Bing. 361. If the particulars of the demise be stated, the same must be proved, Doug. 665; and the deft. must prove the holding, and the rent reserved as stated in the pleadings, as any variance would be fatal: *Brown v. Sayce*, 4 Taunt. 320; *Cossey v. Diggins*, 2 B. & A. 546. [If, however, the evidence only show a tenancy of part of the house, the avowry being for the whole, it would be no variance: *Page v. Cluck*, 10 Moore, 264. See further as to a variance: *Hargrave v. Shewin*, 9 D. & R. 20; 6 B. & C. 34.] As to stating the terms of the tenancy to be from "Old St. Thomas' Day," &c., see 3 Bing. 401. It is no variance, though it appear that the plt. held for a less time than that stated in the avowry: *Forty v. Imber*, 6 East, 434. [See *Smith v. Walton*, 1 Moore & Scott, 380.] Where there is a lease, it must be produced and proved, as it will show the term demised, and the rent recovered: see *ante*, "Deed." Where the holding is by parol, the deft. must prove the tenancy, by showing the payment of rent as such, or an actual letting at the rent stated in the avowry or cognizance, which may be done by a witness acquainted with the facts, or by producing an agreement in writing, though not under seal: Esp. Ev. 297. Where the plt. did not come in under deft., or has never paid rent, he will, under this plea, put the deft. on proof of his \*title; [\*768] and, though a tenant cannot dispute his landlord's title, yet he may show, under this plea, that such title is at an end, or not existing when the distress was made: *Grosvenor v. Woodhouse*, 1 Bing. 38.

*Proof under Riens in Arrear.*] This plea, by itself, admits the tenancy, as stated in the avowry or cognizance, 2 Esp. Rep. 669, 2 B. & A. 546, and puts in issue the fact of the rent being in arrear. Some slight evidence of the arrears must be gone into by deft., and he should serve plt. with a notice to produce all receipts for rent, &c. But the great burden of proving the rent not being in arrear lies on the plt., who should, by defendant's receipts, or otherwise, prove a payment of all rent due, up to the last day of payment preceding the distress: *Hill v. Wright*, 2 Esp. Rep. 699; see *ante*, "Payment," "Receipt." It is not incumbent on the

deft. to prove that the exact amount of the rent claimed in his avowry was due; if any rent be in arrear, it will suffice, *Forty v. Imber*, 6 East, 434, 5 T. R. 246; as it will be insufficient for plt. to show that part only of the rent has been satisfied, for deft. will be entitled to a verdict, if it appear that any part of the rent is in arrear: *Cobb v. Bryan*, 3 B. & P. 348. Under this plea, the plt. may show that he has paid rent to a superior landlord under a threat of distress: *Taylor v. Tunairn*, 6 Taunt. 524; 3 T. R. 513; *sed quære* if not best to plead specially. And, where a claim of interest on a mortgage, affecting the premises, was paid with the deft.'s assent, it was held that the plt. might avail himself of it as a payment under this plea: *Dyer v. Bowley*, 2 Bing. 94. Under an avowry for double rent, under 11 Geo. 2, c. 19, § 18, the deft. cannot recover any single rent: *Johnstone v. Huddleston*, 4 B. & C. 938.

Where the reservation of the rent requires a demand to be made before a distress can be made, the deft. must be prepared with evidence to that effect. There are many cases in which the necessity of a previous demand of the rent in arrear by the lessor is essential, to entitle him to proceed in ejectment: Hob. 208; 7 Co. 28. It is, therefore, safer to make a demand, whenever it is mentioned in the lease: Esp. Ev. 298. And, where there is a penalty for non-payment of rent, as for ploughing of old meadows, where the rent is increased, deft. must prove a demand of the rent and penalty: *ib.* Hob. 133. Where, to an avowry for rent due upon a quarterly holding, the plt. pleads *rents in arrear*, he cannot show a half-yearly holding, and that no rent had accrued, though one of the quarters had elapsed: *Hill v. Wright*, 2 Esp. Rep. 669.

*Traverse of being Bailiff.*] Where the plt. traverses that the deft. is bailiff, the deft. must prove his authority to make the distress; but a recognition of this act will be equivalent to a demand: *Trevillian v. Pine*, 11 Mod. 112; 1 Saund. 347, *d. n.* One joint-tenant or co-parcener has an authority in law, without any express command to distrain as bailiff to his co-tenant: *Leigh v. Shepherd*, 2 B. & A. 466.

*Proof under Avowry for Damage Feasant.*] Deft. may avow where cattle are found trespassing on his own land, or on a common to which he has a right. The points of evidence, in the former case, depend upon the state of repair in which the fences are, and on whom the liability to repair them depends. As to the liability to repair fences, he who has the back of the ditch is bound to keep them in repair: Esp. Ev. 302. The plaintiff should, therefore, be prepared at the trial to show from whence the cattle came on the deft.'s land, where he relies on defendant's fences being out of repair, and be prepared to show that they were lawfully in the place from whence they strayed, and were not trespassing in the close or place from whence they came: Esp. Ev. 303. The deft. must also prove that he was in possession of the land where the distress was made, and that the cattle were there depasturing when taken, *Clement v.* [\*769] *Miller*, 3 Esp. Rep. \*95; for if they escaped out of the deft.'s grounds, he cannot follow them; it must also be proved that they were the plt.'s; and to what extent he was injured: Esp. Rep. 302. When it is a question on a taking under a claim of right of common, deft. must show that he was entitled to common, himself. As to proof of common, &c. *ante*, 369.

### Competency of Witnesses.

The sureties in the replevin-bond are not competent witnesses for the plt.; they may, however, be changed to make them so: *Bailey v. Bailey*, 1 Bing. 92. It has been held, that the declarations of a person under whom the deft. makes cognizance, are not admissible in evidence, 2 Camp. 92; they would, however, if produced as witnesses for deft., be incompetent; such declaration would seem, therefore, to be evidence: *Golding v. Nias*, 5 Esp. Rep. 273. But, where the deft. has made cognizance as bailiff to any one, that person, as bailiff to whom the deft. makes cognizance, cannot be a witness, for the deft. is but his servant, and the rent to be recovered by the distress is on his account; he, therefore, is interested, and cannot be called: *ib.* Where, in an avowry, it was stated that plt. and J. B. held the *locus in quo*, as tenant to the deft., at a money rent, and because it was in arrear deft. distrained, and some evidence was given by the deft. that the plt. and J. B. were in possession of the premises; that a lease had been executed to them by the deft.'s ancestor, which plt. and J. B. had paid for, but which they had refused to execute; but it was not proved that J. B. was not connected with the plt. as to the premises in question, so as to be jointly liable for rent, nor was it shown that the goods distrained were the joint property of the plaintiff and J. B., the plt. tendered J. B. as a witness, who was rejected, without being examined on the *voir dire*, as to his liability to the rent: it was held, that he was not an incompetent witness until that fact was established, and that he had been improperly rejected: *Bunter v. Warre*, 1 B. & C. 689.

### REPLEVIN-BOND, ACTION ON.

**FORM OF REMEDY ON AND PLEADINGS AS TO.]** The form of remedy by action on a replevin-bond is in debt: see 11 G. 2, c. 19. Debt lies by the assignees against one of the sureties in the detinet only: 4 M. & S. 120.

The action may be brought by the sheriff, or by his assignee, under the 11 G. 2, c. 19, s. 22, which allows the bond to be assigned to the avowant, or to the person making cognizance, or to both of them jointly: 1 B. & P. 381, n; 3 M. & S. 180; see *ante*, "*Bail Bond*."

The action may be brought in one of the courts at Westminster; but, when the proceedings in replevin have been removed, it must be brought in the court in which the *re. fa. lo.* is returnable, as on a bail-bond: 2 Sel. Pract. 267; *ante*, 187.

The venue is transitory. The declaration sets out concisely all the proceedings in the replevin, and the failure in fulfilling the condition of the bond. A material variance from the substance of the statement would be fatal. It is usual to commence stating the distress made: the day stated as to when such distress was made, is immaterial. If the distress were made by the plt. as bailiff of another person, it is usual to say as bailiff of A. B., and by his command distrained, &c., 5 T. R. 195; but it is sufficient to allege that A. and B. distrained for rent due to A., without averring that B. was bailiff; 3 M. & S. 180. The goods distrained should not be set forth: *ib.* A variance in setting out the condition would be fatal: *ib.* 3 Taunt. 81; 1 Bing. 6; \*7 Moo. 231, s. c. A mis- [\*770]

description in the name of the suitors of the county court, before whom the plaint was levied, would not, it seems, be material: 3 D. & R. 226; 2 B. & C. 2, *s. c.* It is no variance to state a removal of the suit by *re. fa. lo.* out of the court of C. D., who was then Sheriff, when in fact he was not then sheriff: 5 B. & C. 284; 7 D. & R. 709. It does not seem necessary to state the avowry or cognizance in the declaration: 5 T. R. 195; 2 Chit. Pl. 460, *n.* The declaration is not double, because it alleges that the deft. did not prosecute his suit with effect, and hath not made a return; 3 M. & S. 180; 5 B. & C. 284; 7 D. & R. 709; 2 B. & B. 107; 4 M. & S. 606, *s. c.* Both parts of the condition need not be negatived: *ib.* The judgment should be carefully examined with. Though the breach of the condition be not formerly assigned, plt. will still be entitled to recover, if a sufficient breach otherwise appear: 5 B. & C. 284; 7 D. & R. 709.

All defences should be pleaded specially: *ante*, "Bond." Deft. is at liberty to deny any material averment in the declaration. He may plead that there was fraud in the judgment in the replevin-suit, 2 Marsh. 392, 7 Taunt. 97, 6 Moo. 495: or under *non est factum*, or any other plea, he may show, at the trial, that the action against him was commenced too soon, as before the condition was broken, 5 Taunt. 776, or that the bond was not assignable: see Watson, *Sheriff*. The deft. (a surety) would not be discharged by a writ of inquiry under the 17 C. 2 c. 19, s. 28, and a judgment thereon; and the same could not, consequently be pleaded, 5 B. & C. 284, and see 4 Moo. 918, 2 B. & B. 107; nor could deft. plead that no *retorno habendo* was issued, 5 B. & C. 284, 7 D. & R. 709; nor can the surety plead that time was given to the principal: 6 Taunt. 379; 2 Marsh. 392, *s. c.* Payment of rent due at the time of distress, and of the costs, may be pleaded: 1 Y. & J. 285. As to when the court will relieve the bail, see Tidd 528, 296, 9 *ed.*

### Precedents.

DECLARATION IN B. K., IN A DEBT ON A REPLEVIN-BOND AGAINST ONE OF THE BAIL, WHEREIN SUIT WAS REMOVED BY *RE. FA. LO.* AND *PLT.* OBTAINED JUDGMENT OF NON PRO, FOR WANT OF PLEA IN BAR.

Ellenborough.

Trinity Term, 9 Geo. 4.

London (*ante*, 773,) to wit, J. R., assignee of G. N. E., Esq., late sheriff of the county of Bedford, according to the form of the statute in such case made and provided, complains of A. H., J. B., and B. J., the defts. in this suit, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that they render to the said J. R., as assignee as aforesaid, the sum of £40, of lawful money of Great Britain, which they owe to and unjustly detain from, him, for that whereas, heretofore, to wit, on the second day of July, A. D. 1827, (*ante*, 773,) at the parish of B., in the county of Bedford, the said plt. as bailiff of one J. F., and, by his command (*ante*, 773,) distrained divers goods and chattels, to wit, the goods and chattels of the said A. H., hereinafter mentioned, for a certain sum of money then due to the said J. F. for rent; and the said goods and chattels being so distrained, the said A. H. afterwards, and within the space of five days then next ensuing, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, made her plaint to the said G. N. E., Esq., then being sheriff of the said county of Bedford, out of the county court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said A. H., by the said plt. and then and there prayed the said sheriff that the said goods and chattels might be forthwith replevied by the said sheriff, and delivered to the said A. H., and thereupon the said G. N. E., Esq., so being sheriff of the said county of Bedford, according to the form of the statute in such case made and provided, did take from the said A. H., and from the said J. B., and the said B. J., as two responsible sureties, a bond, in double the value of the said goods and chattels



so distrained, as aforesaid, (the value of the said goods and chattels having been, on that occasion, first ascertained by the oath of a credible witness, duly sworn, according to the form of the statute in such case made and provided;) and the said defts., \*to wit, on the 3d day of July, in the year aforesaid, to wit, at London, by their [\*771] certain writing obligatory, sealed with their respective seals, and now shown to the court of our said lord the king, before the king himself here, the date whereof is the day and year last aforesaid, did acknowledge themselves to be held and firmly bound unto the said G. N. E., Esq., so being sheriff of the said county of Bedford, in the said sum of £40, above demanded to be paid to the said sheriff, his attorney, executors, administrators, or assigns, with a condition thereunder written (*examine condition carefully*;) that, if the said A. H. did appear at the then next county court, to be holden for the county of Bedford, at the Swan Inn, at Biggleswade, in the said county, and should then and there enter her plaint, and the same prosecute with effect, against the said plt. for taking and unjustly detaining of her certain goods and chattels, in the said condition mentioned, and should make a return thereof, in case a return thereof, in due course of law, should be adjudged against her, and also did and should, from time to time, and at all times thereafter, save harmless, and keep indemnified, the said sheriff of Bedfordshire, his under-sheriff, deputy or deputies, bailiff or bailiffs, and every of them, of and from all costs, charges, damages, and expenses, that he, they, or any of them, should or might sustain, or be put unto, for or by reason of the replevying and delivery of the aforesaid goods and chattels to the said A. H., or for, touching, and concerning any suit, matter, or thing relating thereunto, then the said obligation was to be void and of none effect, otherwise to remain in full force and virtue; and thereupon the said sheriff afterwards, to wit, on the day and year last aforesaid, at London aforesaid, at the prayer of the said A. H., replevied and made deliverance of the said goods and chattels to the said A. H., according to the duty of his said office, and afterwards, to wit, at the then next county court for the said county of Bedford, to wit, at the county court of the said sheriff, holden at the Swan Inn at Biggleswade, in the said county, on the — day of — A. D., — aforesaid, before G. H. and J. K., then suitors, (*ante*, 774) of the said court, the said A. H. did appear, and then and there in the same court, without the writ of our said lord the king, levied her plaint against the said plt. for the taking and unjustly detaining of the said goods and chattels of the said A. H., and then, and there found pledges as well for prosecuting her said plaint as for returning the said goods and chattels, if return thereof should be adjudged by law, to wit, the said other defts. which said plaint, afterwards to wit, on the — day of — A. D. —, was duly removed, at the instance of the said plt., from and out of the county court of the said sheriff of Bedfordshire into the court of our said lord the king, before the king himself, to wit, at Westminster, in the county of Middlesex, by virtue of his majesty's writ of *recordari facias loquellam*, before them duly sued and prosecuted, out of the court of our said lord the king, of his Chancery at Westminster, aforesaid, returnable before — on —; and thereupon the said A. H., afterwards, to wit, in Michaelmas term, in the 8th year of the reign of our said lord the king, in the court of our said lord the king, before the king himself, by G. K., her attorney, declared against the said now plt. in the said plea, of taking and unjustly detaining her goods and chattels; and by the said declaration, she the said A. H., by the said G. K., her attorney, complained that the said now plt., on the 2d day of July, A. D. 1827, in the parish of Great Barford, in the county of Bedford, in a certain dwelling-house, there took the goods and chattels, in such declaration more particularly mentioned, of her, the said A. H., of the value, to wit, of the value of £500, and unjustly detained the same, against sureties and pledges, until, &c., and wherefore the said A. H. said that she was injured and had sustained damages to the amount of £500, and therefore she brought her suit &c., and afterwards, to wit, in that same term, in the eighth year of the reign aforesaid, in the said court of our said lord the king, before the king himself, the said court being then and still holden at Westminster, in the county of Middlesex, the said now plt., by G. E. C., his attorney, came and defended the wrong and injury, when, &c., and a bailiff of the said J. F. well acknowledged the taking of the said goods and chattels in the said declaration \*mentioned, and in the dwelling-house and premises in which, &c., in the said declaration of the said A. H. mentioned, and justly, because he said that one T. H., then deceased, in his life-time, and the said A. H., administratrix of the said T. H., after the death of the said T. H. for a long space of time, to wit, for the space of one year next before and ending on the 24th day of June, in the year of our Lord, 1826; and the said A. H., as administratrix as aforesaid, from thence until, and at the same time when, &c., to wit, at the parish aforesaid, in the

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county of Bedford aforesaid, held and enjoyed the said dwelling-house and premises in which, &c., with the appurtenances, as tenants, thereof to the said J. F. under and by virtue of a certain demise made at and under a certain yearly rent of £40, payable yearly, on the 24th day of June in each year; and because £40 of the rent aforesaid, for the space of one year, ending on the 24th day of June, in the year last aforesaid, and from thence and until and at the said time when, &c., and were due and in arrear from the said A. H., as administratrix as aforesaid, to the said J. F., aforesaid, he, the said now plt., as bailiff of the said J. F., well acknowledged the taking of the said goods and chattels in the said declaration, and the said dwelling-house and premises in which, &c., and justly, &c., as for and in the name of a distress for the said rent, so due and in arrear as aforesaid, and which said rent then still remained due and in arrear to the said J. F. and that the said now plt. was ready to verify: wherefore he prayed judgment and a return of the said goods and chattels, together with his damages, &c., according to the form of the statute in such case made and provided, to be adjudged to him, &c.; and such proceedings were thereupon had, in the said plea, in the said court of our said lord the king, before the king himself, at Westminster aforesaid, that afterwards, to wit, in ——— term, in the ——— year of the reign of our said lord the king, in the said court of our said lord the king, before the king himself, (*examine carefully with judgment*) it was considered and adjudged in and by the same court, that (the said A. H. should take nothing by her said plaint, but that she and her pledges to prosecute should be in mercy, &c., and that the said now plt. should go thereof without day, and that) the said now plt. should have a return of the said goods and chattels, as by the record and proceedings thereof now remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears; and the said plt., in fact, further saith, that the said A. H. did not make a return of the said goods and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do; whereby the said writing obligatory became forfeited to the said G. N. E., Esq., so being sheriff of the said county of Bedford as aforesaid, and, the same being so forfeited, the said sheriff afterwards, to wit, on the 16th day of May, A. D. 1828, at London aforesaid, at the request of the said plt., the defendant in the said suit, by an indorsement on the said writing obligatory, then and there duly made and attested in the presence of two credible witnesses, and sealed with the seal of office of the said sheriff of the said county of Bedford, assigned the said writing obligatory to the said now plt., according to the form of the statute in such case made and provided, as by the said assignment, to the court of our said lord the king now here shown, the date whereof is the day and year last aforesaid, may more fully appear; by means whereof, and by force of the statute in such case made and provided, an action hath accrued to the said plt., as assignee of the said G. N. E., Esq., so being sheriff of the said county of Bedford as aforesaid to demand, and have of and from the said defts. the said sum of £40, above demanded; nevertheless, the said defts., although often requested so to do, have not, either of them, as yet paid the sum of £40, above demanded, or any part thereof, to the said G. N. E., Esq., before the said assignment, or to the said plt., assignee as aforesaid, since the said assignment, but to pay the same, or any part thereof, to them, or either of them, the said defts. have hitherto wholly refused, and still do refuse, to pay the same, or any part thereof, to the said plt., assignee as aforesaid, to the damage of the said plt., as assignee as aforesaid, of £40; and therefore he brings his suit, &c. Pledges, &c.

[\*773] \*See other forms in debt or replevin-bond, where plt. obtained judgment in the county court, 2 Chit. PL 462; where plt was non-prossed for not declaring, *ib.*; as to pleas to, *see ante*, 774.

### *Evidence,*

The evidence must necessarily depend on the issues raised by the pleadings, which must, in general, be special; otherwise, deft. admits the facts stated, as in an action on a bail-bond: *ante*, 190. As to the evidence under *non est factum*, *ante*, 195; as to what defences deft. may avail himself of, *see ante*, 774.

If a surety in replevin-bond be a material witness in the cause, it seems,

the court will grant a rule for substituting another surety in his place, upon giving the deft.'s attorney notice of such rule: *Bailey v. Bailey*, 1 Bing. 92.

*Damages.*] The principal is liable for the full amount of the whole rent due and costs. The bail are liable for the rent due at the time of the distress, and costs, 1 Y. & J. 285; and they are both liable together to the penalty of the bond, and the costs of the action against himself, 1 Taunt. 218; and as to the extent of liability, where only one bail, see 1 Moo. 68.

[The sureties are only liable for the value of the goods seized, and double costs; and if that value exceeds the amount of rent due, they will only be liable for the rent: *Hunt v. Round*, 2 Dowl. P. C. 558.]

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REPLEVIN.

**ACTION FOR NOT TAKING BOND, OR GOOD SURETIES IN.**

If the deft. in replevin obtain judgment, but is not able to obtain satisfaction, either against the principal or against the sureties, an action on the case may be maintained against the sheriff, for taking insufficient pledges, *Moyser v. Clarke*, Cro. Car. 446, 16 Vin. Ab. 399, 1 Saund. 195, *a. n.*; or, if the sheriff has lost the replevin-bond, an action may be maintained against the sheriff, for hereby depriving the deft. of his remedy against the sureties: *Perreau v. Bevan*, 5 B. & C. 284. As to an attachment, *R. v. Lewis*, 2 T. R. 617; *Yea v. Lethbridge*, 4 T. R. 435; *Tessyman v. Gilbert*, 1 N. R. 392. The party who would be entitled to the assignment of the replevin-bond, is the proper person to bring the action: *Page v. Eamer*, 1 B. & P. 378.

See precedents of declaration in case, and notes for not taking a replevin-bond, according to 11 G. 2, c. 19, s. 23, 2 Chit. Pl. 750; declaration for taking insufficient pledges in replevin, 2 Chit. Pl. 754.

With respect to the evidence, if the action be for taking insufficient pledges in replevin, the plt. must be prepared to prove all the material averments in the declaration, viz:—the taking of the distress, the replevying it, the proceedings in the replevin, the taking of the bond, and the insufficiency of the sureties. The replevying may be shown by the original precept to deliver. Where it remains in the possession of the bailiff, he should be served with a subpoena *duces tecum*; but, if it has been returned to the sheriff, he should be served with a notice to produce it. As to evidence to connect the sheriff, and the bailiff, *post*, "*Sheriff*." The deft. should be served with a notice to produce the bond (if in his possession) served on the deft., and the service of such notice proved; and, where this had been done, and it appeared that the original bond had been shown to the plt.'s agent, and a copy of it delivered to him, it was held unnecessary to call the subscribing witness; and that, as against the sheriff, it must be taken to be a valid bond: *Scott v. [ \*774 ]* *Waitham*, 3 Stark. 168. And, where the sheriff had assigned the bond to the plt., it was held not requisite for the plt. to prove execu-

tion by the sureties; for that, as against the sheriff, proof the assignment by him to the plt. was sufficient: *Barnes v. Lucas*, R. & M. 266. If the action be for taking insufficient pledges in replevin, it must appear that the pledges were insufficient at the time they executed the bond. If the pledges were apparently responsible, and the sheriff did not omit any means in his power to ascertain to the contrary, this action cannot be maintained against the sheriff: *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27, s. c.; *Sutton v. Wait*, 8 Moo. 27; *Scott v. Waithman*, 3 Stark. N. P. C. 170. The sureties themselves are competent witnesses to prove their sufficiency or insufficiency: 5 Taunt. 225; 1 Marsh. 27; 2 Ph. Ev. 274. If the sheriff actually know that the party is not responsible, or if he have the means of such information within his power, he is liable: 3 Stark. 170.

It is no defence to show that the plt. has elected to proceed under the stat. 17 Car. 2, c. 7: *Perreau v. Bevan*, 5 B. & C. 284. And, although the deft. in replevin had never issued a writ of *retorno habendo*, this action lies against the sheriff, for the replevin-bond is forfeited by the plt. in replevin not prosecuting his suit with effect; and, consequently, in default of the sureties, an action lies against the sheriff: *ib.* This action may be maintained after the deft. in replevin has taken an assignment of the replevin-bond, and sued both principal and sureties thereon, for the sheriff is not discharged by the deft. in replevin proceeding on the bond: 1 Saund. 195, n.

With respect to the damages, the sheriff is not liable beyond the extent to which the sureties themselves would have been liable—that is to the extent of double the value of the goods distrained: *Evans v. Branden*, 2 H. Bl. 547; *Perreau v. Bevan*, 5 B. & C. 290; *Hofford v. Alger*, 1 Taunt. 218. In the case of *Scott v. Waithman*, Abbott, C. J., 3 Stark. 171, is reported to have said, “as the verdict in the replevin-suit was *merely for the return of the goods*, the jury could not, in their verdict, exceed the value of the goods:” see 4 T. R. 493; 2 H. Bl. 36. The plt. cannot recover as special damage (beyond the penalty of the bond) the expenses of a fruitless action against the pledges, unless he gives the sheriff notice to sue them: *Baker v. Garratt*, 3 Bing. 56.

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## REPLICATION.

GENERAL NATURE OF, AND RULES AS TO, 774.  
 QUALITIES OF, *ib.*  
 FORMS AND PARTS OF, 775.  
 PRECEDENTS, 778.

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GENERAL NATURE AND RULES AS TO.] A replication is an answer to the deft.'s plea. When the plea properly concludes to the country, the plt. cannot, in general, do otherwise than by adding what is termed the *similiter*, Com. D. *Pleader*, R. 1; but, when the plea concludes with a verification, the replication may either, first, conclude the deft. by matter of estoppel; or, secondly, may deny the truth of the matter alleged in the plea, either in whole or in part; or, thirdly, may confess and avoid the

plea; or, fourthly, in the case of an evasive plea, may now assign the cause of action: 1 Chit. Pl. 523.

QUALITIES OF.] A replication should answer so much of the plea \*which it professes to answer, or it will be a discontinuance, [\*775] Com. D. *Pleader, F.*, 4 W. 2, 1 Saund. 338; and it is a general rule, that an entire replication, bad in part, is bad for the whole, Com. D. *Pleader, F.* 35, 3 T. R. 276, 2 Saund. 137; but this rule does not apply where the matter objected to is merely surplusage: *ib.*; 1 East, 219; 1 Saund. 337, *b. n.* 2; 1 Chit. Pl. 556. The replication must not depart from the allegations in the declaration in any material matter. A departure in pleading is said to be when a party quits or departs from the case or defence which he has first made, and has recourse to another; it is when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it: 2 Saund. 84, *a. n.* 1; Co. Lit. 304, *a.*; 2 Wils. 98; 1 Chit. Pl. 557. A departure may be either in the substance of the action or defence, or the law on which it is founded: Co. Lit. 304, *a.*; 2 Saund. 84, *a.*; 1 Chit. Pl. 557; 4 T. R. 504. Matter which maintains and fortifies the declaration or plea is not a departure, Com. D. *Pleader, F.* as, in trespass for taking a horse, if the defendant justify for a distress damage feasant, the plt. may reply that the deft. afterwards used the horse, which shows that he was a trespasser *ab initio*: *ib.*; 1 Salk. 221; 3 Wils. 20; Cro. Jac. 148. Where time or place, or any other circumstance, is material, the plt. cannot, as we have seen, vary from his previous statement of it; though, where matter of defence has arisen pending the suit, it may be pleaded *puis darrein continuance, relicta verificatione* of the former plea: 2 Str. 1106; 1 Chit. Pl. 560. [In assumpsit for goods, the defendant, a woman, pleaded coverture; replication, that she was living separate in adultery, without the knowledge of the plaintiff, and that he dealt with her as a *feme sole*, and that she, after the death of her husband, promised to pay; this replication was held bad, as a departure, the promise in the declaration being void, and that alleged in the replication amounting only to a moral obligation. *Meyer v. Haworth*, 3 Nev. & P. 462.] The only mode of taking advantage of a departure is by demurrer: 2 Saund. 84, *d.*; 1 Chit. Pl. 560; Wils. 96.

The facts stated in the replication must be asserted with certainty, and it is said that more is requisite in a replication than a declaration, though certainty to a common intent is in general sufficient: Com. D. *Pleader, F.* 17; 1 Chit. Pl. 561. Where the replication is only to a part of the plea, the part alluded to should be ascertained with certainty: Lutw. 241; Com. D. *Pleader, F.* 4. In general, also when material to the action, time, place, and other circumstances must be stated with the same certainty and precision as in the previous pleadings; but, where time and place are immaterial, it should seem, with analogy to pleas in bar, that, as the time and place mentioned in the declaration must, when immaterial, be adhered to, no repetition of either will be necessary: see 2 H. Bl. 161; 1 Saund. 8, *a.*; 8 T. R. 463; 1 B. & P. 640; 1 Chit. Pl. 561.

The replication must not be double, or, in other words, contain two answers to the same plea: Com. D. *Pleader, F.* 16; Rep. temp. Hardw. 389; 1 Chit. Pl. 561. But a replication may frequently put in issue several facts, where they amount to only one connected proposition,

1 Burr. 317; 568, 567, Rep. temp. Hardw. 282; and a replication may contain several distinct answers to different parts of a plea divisible in its nature: 1 Chit. Pl. 562, and cases there. Duplicity in a replication is aided, unless the defendant demur specially, pointing out the particular defect: 27 El. c. 5; 4 Anne, c. 16, s. 1; 1 Saund. 397, d. n. 3. Plt. may plead several pleas in bar in replevin: 2 B. & P. 368.

**FORMS AND PARTS OF.]** A replication is usually entitled in the court and of the term of which it is pleaded, and the names of the plt. and def. are stated in the margin: thus, "A. B. against C. D.:" a mistake in these names would not, it is presumed, be material. Where any new matter is stated in the replication which occurred pending the suit, as the death of one of several pts. or defs. between the plea and replication, this should be suggested, and a special imparlance may be stated at the head of the replication; 1 Chit. Pl. 518. When the replication denies or confesses and avoids the plea, it commences with an allegation technically termed the *precludi non*. When the body of the replication only contains an answer to a part of the plea, the commencement should recite [\*776] or specify that part intended to be answered; \*for, should the commencement assume to answer the whole plea, but the body only contains an answer to part, the whole replication will be insufficient, and so *vice versa*: 1 Saund. 28, n. 3, 377-8; Com. D. *Pleader*, F. 25; Lutw. 241; 2 B. & P. 427; 1 Chit. Pl. 523.

The body of the replication contains, either,—1st, matter of estoppel; 2dly, a denial of the plea; 3dly, a confession and avoidance of it; or, 4thly in the case of an evasive plea, a new assignment: 1 Chit. Pl. 523.

With respect to when a general denial is proper or advisable, it is to be observed, that, in actions on contracts and in replevin, the replication denies the fact, or one of the facts, alleged in the plea in express words. But in trespass, and in actions on the case for slander, a replication, containing a general denial of the whole plea, frequently occurs: Com. D. *Pleader*, F. 18; *Crogate's case*, 8 Co. 67; 1 Chit. Pl. 525. This replication puts in issue, and compels the defendant to prove, every material allegation in his plea, Com. D. *Pleader*, F. 18, 224; and, therefore, it is frequently advantageous to the plt. to adopt it, when by the rules of pleading it is permitted. In general, when the deft.'s plea consists merely of matter of excuse, and not of matter of right or interest inconsistent with or affecting the right the infringement of which is complained of in the declaration, whether it relate to the persons, personal property, or real property, the general replication *de injuria* is sufficient: *ib.*; 8 Co. 67, a. And in these cases, when a title is stated, merely as inducement to the defence, the plt. need not answer or particularly deny it, because it is merely collateral to the matter in dispute, which constitutes the difference between a case in which the plt. makes title by his declaration to any thing, and the deft. in his plea denies it, or claims an interest therein, affecting the same, when he must reply specially: Yelv. 157; Cro. Jac. 225; Willes, 102-3; Com. D. *Pleader*, F. 20, 21; 1 Chit. Pl. 526, and cases there collected. In general, if the deft. justify by a writ or warrant of a justice of the peace, 12 Mod. 582-3, or as *servant of another*, or by *his command*, the replication must be special, and must admit or protest the writ, warrant, or commandment, and reply *de injuria abque residuo causa* or take issue simply on the writ, warrant, or commandment:

8 Geo. 67, b. 67, a.; Lutw. 1459; 1 B. & P. 76; Com. D. *Pleader, F.*; 1 Chit. Pl. 527. So, when by deft.'s plea any authority or power is immediately or immediately derived from the plt., there, although no interest be claimed, the plt. ought to answer it specially, and shall not reply *de injuria* generally, 1 B. & P. 80, Com. D. *Pleader, F. 22*; as if he justify by virtue of the lease, or license, or command of the plt.: *ib.*; Com. D. *Pleader, F. 22*; and see other instances, 1 Chit. Pl. 528. Though the plea claim no interest in the property mentioned in the plt.'s declaration, but merely contains matter of excuse, yet, where such matter of excuse arises in part out of the *seisin in fee* of another, it is not advisable to reply *de injuria*, because that replication is only allowed where, in the plea, an excuse is offered to personal injuries; and not even then, if it relate to any interest in land, which would make part of the issue: 1 B. & P. 80; 1 Ld. Raym. 640; Cro. Pl. 539-40; Yelv. 157; 2 Saund. 294; 1 Chit. Pl. 528.

There are also many cases, in which, though the replication *de injuria* might not be objectionable upon demurrer, still it will not be proper to adopt it, and it may be necessary in effect to confess and avoid the plea: 1 Chit. Pl. 529; 2 Bl. R. 1165. So, in other cases, where it may not be absolutely necessary to reply specially, it may be advisable so to do, in order to narrow the plt.'s evidence, and to compel the deft. to admit a part of his title: Willes, 54, 204; 1 East, 217. As to the form of the replication *de injuria*, see 1 Chit. Pl. 530, *post*. Where *de injuria* is improperly replied, the deft. may demur generally, but the defect will be aided after verdict: Com. D. *Pleader, F. 24*; Hob. 76; 1 Ld. Raym. 50.

With respect to the form and parts of a replication denying only part of the plea, it is a rule, a party may traverse or deny any material allegation in his opponent's pleadings, although it might have been unnecessary "to state it so precisely as laid; but, where the allegation is not material, it cannot be traversed, 2 Saund. 207, n. 21, 22, 24, Com. D. *Pleader, Q.* 1 Chit. Pl. 531; and a material fact may be denied, though laid under a *videlicet*, 1 Saund. 170, n. 2; and whatever is necessarily understood, intended, or implied, is traversable as much as if it were expressly alleged, 2 Saund. 10, n. 14; but matter not before stated, or necessarily implied, is not traversable: 1 Saund. 312, n. 4; 1 Saund. 347, n. c.; Cro. Car. 586; Willes, 100, n. b.; 1 Chit. Pl. 531. And, when a party appears on the face of the pleadings to be estopped from denying a fact, if he were to traverse it, his pleading would be demurrable: Str. 817; 8 T. R. 487; 7 *ib.* 557. If time, place, or any other circumstance, when not material, be traversed, the opposite party may demur. In general, the intent, or *virtute cujus*, as "by virtue of the said writ, &c." ought not to be put in issue, Com. D. Pl. 7; 12 Mod. 267; 1 Saund. 23, n. 5, 299, n. 3; nor is matter of law or legal inference, in general, traversable: 2 H. Bl. 182; 5 T. R. 367; 2 Saund. 159; a. 161; n. 11; 1 Saund. 23, n. 5. The traverse should also be on some affirmative matter, and not put in issue a negative allegation: 6 East, 556-7. The traverse, also, must not be too large, 3 B. & P. 348; Com. D. *Pleader, G.* 15, 21; 1 Saund. 268; nor so narrow as to prejudice the defence: Com. D. *Pleader, G.* 17; 1 Chit. Pl. 523, 532.

With respect to the modes of denial, there are three: first, the plt. protests some fact or facts, and denies the other, concluding to the country; or, secondly, he at once denies the particular fact intended to be put in

issue, and concludes to the country; or, thirdly, formally traverses a particular fact, and concludes with a verification: 1 Chit. Pl. 533.

When the pleading of either party contains several matters, and the opposite party is not at liberty to put the whole in issue, he may protest against one or more facts, and deny the other, *Bac. Ab. Accord, C.*, 1 Chit. Pl. 534; or may protest one fact, and traverse another: *Popl. 1*. This protestation is of no other use than that, in case the party making it succeeds in the point to be tried, he thereby saves to himself the liberty of disputing, in any other suit, the truth of the allegation which is protested against: 2 Saund. 103, *n.* 1, *Com. D. Pl.* 4, 1 Chit. Pl. 534.

The description of replication, at once denying the particular fact intended to be put in issue, and concluding to the country, without any preamble, and without a formal traverse, most frequently occurs in practice, and, on account of its conciseness, should, when practicable, be adopted: see instances, 1 Chit. Pl. 535. As to when a formal traverse is necessary, see 1 Chit. Pl. 536.

A replication, denying the effect of the plea, and showing a particular breach, without confessing and avoiding the plea, most frequently occurs in debt on a bond, conditioned to perform covenants, &c.: *Com. D. Pl. F.* 14, 15. The rule is, that in all cases (except in the case of an award, which stands upon a particular ground,) when the deft. pleads matter of excuse, which admits a non-performance, it is sufficient if the plt. deny the plea, and he need not assign a breach in his replication; but it is otherwise where the deft. has pleaded performance, *Willes*, 12, 13: in the latter case, to a plea of general performance of the condition of the bond, the replication must state the breach with particularity, and should conclude with a verification, in order that the deft. may have an opportunity of answering it: 2 Burr. 774, 1 Saund. 101, 102, *Com. D. Pl. F.* 14, 15, 1 Chit. Pl. 539.

The replication admitting, either in words or in effect, the fact alleged in the plea, and avoiding the effect of it by stating new matter, frequently occurs in practice. As, if infancy be pleaded, the plt. may reply that the goods were necessities, or that the deft., after he came of age, ratified and confirmed the promise: 1 Chit. Pl. 540, and other instances there. In replications of this description, it is necessary that the material parts of

the deft.'s title be admitted, either in terms or in effect: *Dyer*, [\*778] 171, *b.*; \**Sir Wm. Jones*, 352, and see mode of admission, 1 Chit. Pl. 540. When the replication completely confesses and avoids the deft.'s plea, it should not conclude with a traverse, 1 Saund. 23, *n.* 2, 2 Saund. 28, *n.* 2, *Com. D. Pl.*, 2 G. 3, and there is no occasion to give colour to the deft. in this replication, 1 East, 212, though, as it introduces new matter, it must conclude with a verification, in order that the deft. may have an opportunity of answering it: 1 Saund. 103. A replication of this nature must confess, as well as avoid the effect of the deft.'s plea, and if the plt. rely on some excess, as an imprisonment under colour of process, after a voluntary escape, this matter should be new assigned, and not replied: 2 Wils. 3, 4; 2 T. R. 172. As to new assignments, see *ante*, 554.

With respect to the *conclusion* of a replication, when the replication denies the whole of the deft.'s plea, containing matter of fact, it should conclude to the country, 1 Saund. 103; and it is an established rule, applicable to every part of pleading subsequent to the declaration, that when there is an affirmative on one side and a negative on the other, or *vice*



*verea*, the conclusion should be to the country, although the affirmative and negative be not in express words, but only tantamount thereto, *ib.*; and it may also be laid down as a safe rule, that where a deft. cannot take any new or other issue in his rejoinder that the matter he had before pleaded, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, the plt. should conclude to the country, *ib.*; and it is not material in this case that the replication contain a formal traverse, for, where a traverse comprises *the whole* matter of the plea, the replication may still conclude to the country: 1 Salk. 4; 1 Saund. 103, *a. b.* Where new matter is alleged in the replication, it should conclude with an averment, in order to give the deft. an opportunity of answering it, 1 Saund. 103, *n. 1*, 327, *n. 1*, 2 Saund. 63, *g.*, and an appropriate prayer of judgment for debt and damages, or damages only, according to the form of action, and the subject matter of dispute, and not merely *unde petit judicium*, if he *actione precludi debet*. But, when the deft. would not be at liberty to traverse or answer the new matter without a departure, the replication may, notwithstanding the introduction of new matter, conclude to the country, though a conclusion with a verification is most usual: 1 Saund. 327, *n. 1*; 1 Chit. Pl. 539.

*Precedents.*

SPECIAL SIMILITER.

In the K. B. (or C. P. or Exchq.)

— Term, 9 Geo. 4.

(Term when filed or delivered.)

A. B. } And the said plt., as to the plea of the said deft., by him first above pleaded,  
 etc. } and whereof he hath put himself upon the country, doth the like.  
 C. D. }

COMMENCEMENT OF REPLICATION TO A SPECIAL PLEA.

And the said plt., as to the said plea of the said deft., by him (secondly) above pleaded, saith that he, the said plt., by reason of any thing by the said deft. in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said deft., because he saith, that, &c. (*Here state the subject-matter of the replication.*)

CONCLUSION TO THE COUNTRY.

And this he, the said plt., prays may be inquired of by the country, &c.

CONCLUSION WITH A VERIFICATION.

And this he, the said plt., is ready to verify; wherefore he prays judgment, and his damages by him sustained on occasion of the non-performance of the said several promises and undertakings (or, "trespasses," or, "grievances," or, "causes of action") in the said declaration mentioned, to be adjudged to him, &c.

RES GESTA.—*Ante*, 56.

[\*779]

RETURN.—*Post*, WRIT;—*ante*, FALSE RETURN.

REVERSIONER.—*Ante*, 81, 473, 689.

RIENS EN ARREAR.—*Ante*, 393.

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RIENS PER DESCENT OR DEVISE.—*Ante*, 561.

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### RULE OF COURT.

As to the effect of payment of money into court, and how proved, *ante* 494, 5.

A rule of court is proved by the office copy of the rule, which is in itself an original, when made out in the usual course of office, by the clerk of the rules, or his deputy, and does not, therefore, require to be proved as an examined copy; but the production of it is sufficient: *Selby v. Harris*, 1 Ld. Raym. 745; B. N. P. 229; 1 Camp. 102. How opposite party is to prove rule *ante*, 494.

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### SECONDARY EVIDENCE.

*The best evidence must be adduced*, 779.

*What must be done to admit of Secondary Evidence*, 781.

*Proof of Loss, &c. of best Evidence*, *ib.*

*Proof of Possession in adverse Party*, 782.

*Proof of Notice to produce, &c. ib.*

*What sufficient Secondary Evidence, ib.*

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EVIDENCE is divided, with regard to its degree, into primary and secondary.

*The best Evidence must be adduced.*] It is a general rule of law, that the best evidence must be given of which the nature of the case is capable, and which the party had power to produce: 1 Show. 397; Holt, 284; 1 Salk. 281; Carth. 220; 2 East, 192; B. N. P. 293. To prove a written lease for years, or other deed, nothing else shall be admitted but the very deed itself, if within the control of the party who has to prove it: 10 Co. Lit. 92, *b.*; Gilb. Ev. 93. A will of lands, also, must be produced and proved in the same manner as a deed, and the probate is not evidence: 2 Camp. 389; Gilb. Ev. 71. But the probate is primary evidence to prove a will of personal property, or that a particular person is executor: 4 T. R. 258; 3 Salk. 154; B. N. P. 246; *ante*, 738. If the execution of a deed or other instrument be attested, one of the subscribing witnesses, if to be found, must be produced to prove it, that being the best evidence of the fact: 7 T. R. 266; *ante*, 425. If an agreement has been reduced to writing and signed, that writing must be produced to prove it, as [\*780] primary evidence; and where, \*if produced, it would not be admissible for want of a stamp, then, if lost, parol testimony is not admitted to prove its contents, 3 B. & A. 588, 2 Moo. 513; not even

though discharged by the wrongful act of the opposite party: 2 B. & A. 478. A bill of exchange, or promissory note, must be produced and proved like other instruments, and, if destroyed or lost when not in a negotiable state, secondary evidence is admissible; but, if lost in a negotiable state, no action can be maintained thereon, for no secondary evidence can, in that case be admitted; 2 Camp. 211; 1 Holt, 144. The indecency of evidence is no objection to its being received, nor an excuse for not producing it: *De Costa v. Jones*, 2 Cowp. 729. To prove the deft. was elected constable of a ward, a list of persons sworn in, from the town clerk's office, was held insufficient, for the ward-mote book might have been produced: *Underhill v. Wills*, 3 Esp. Rep. 56. In an action for words spoken in the conduct of a cause, the proceeding must be produced in evidence: 1 Esp. Rep. 399. The memorial of a conveyance registered is not evidence of its contents: 2 Esp. Rep. 549. An entry in the books of the receiver of duties upon carts is not evidence of property, without showing by whom the entry was made: 1 Esp. Rep. 369. To prove rent payable quarterly, evidence how other tenants of the plt. paid is not admissible: Peake, 95. In trover, where the plts. claim the goods as purchased by a written agreement, no other evidence of the purchase is admitted than such writing: *Brain v. Harden*, 2 C. & P. 52. To support a plea in abatement, that the assignees of C., a bankrupt, ought to have joined, the assignment, or some admission, must be given in evidence, and proof that they acted as assignees is insufficient: *Pasmore v. Banasfield*, 1 Stark. 296. A witness may not be cross-examined as to what he swore in an affidavit, unless the affidavit be produced; *Sainthill v. Brand*, 4 Esp. Rep. 74. To prove the discharge of an insolvent, neither parol evidence, nor the admission of the plt., nor even an order reciting the judgment of discharge and directing his release: are sufficient. The best and primary evidence is the original adjudication of the court, produced by the clerk, or a clerk, or a copy duly authenticated: *Scott v. Clare*, 3 Camp. 236; *Carpenter v. White*, 3 Moo. C. P. 231. Where a copy of the document is made evidence by act of Parliament, the copy must be produced, and the original, if not evidence at common law, is not admissible by implication; 2 Camp. 121. If a deed be pleaded with a profert, secondary evidence of its contents can in no case be admitted: 4 East, 588; 1 Stark. 74. The loss or other excuse must be pleaded: *ante*, 739; 3 T. R. 151, 153; 2 H. Bl. 259; *Munn v. Godbold*, 11 Moo. Rep. 49. But, in some cases, the best evidence seems to be dispensed with, or rather evidence of primary degree is sufficient, though there be other of stronger or more unerring assurance: as, to prove a person's hand-writing, the testimony of others is admitted, for their knowledge is acquired by the same means as his own, and therefore, accepted as primary, in ordinary cases. But to *disprove* hand-writing, and prove it forged, the writer himself must be called, for he may know it to be or not to be his, by other circumstances than the character of the writing, and therefore all other proof is secondary: Phil. Ev. c. 7, s. 6. Yet the cashier of the Bank is not called to prove his signature a forgery: 2 East, P. C. 1000. The plt.'s acknowledgment of payment is primary proof, though a receipt appears to have been given: *Jacob v. Lindsay*, 1 East, 460. Where a memorandum of the agreement was not signed, parol testimony is admitted: *Dalison v. Stark*, 4 Esp. Rep. 163; 1 East, 460; *Ramsbottom v. Lumbridge*, 2 M. & S. 434; *Doe d. Bingham v. Cartwright*,

3 B. & A. 326; *Stevens v. Pinney*, 8 Taunt. 328. Where, in a case of removal, an inhabitant of the appellant's parish stated, upon the *voir dire*, that he occupied a cottage there of the annual value of £25, but was not valued to, nor paid, any rate or tax, his testimony was held sufficient proof of the facts; nor was it necessary to produce the rate itself: *Rex v.*

*Gisburn*, 15 East, 57. In the case of *Rex v. Hunt*, 3 B. & A. [\*781] 568, the original resolutions proposed at a seditious \*meeting were not required, but a copy given by deft. to witness, and proved by him to correspond with the original, was considered as good evidence; and parol testimony of the inscriptions of the flags and banners displayed there was admitted without producing the originals. And, in all cases, except on a plea of *nul tiel record*, where a fact is to be proved by a record, an examined copy is sufficient evidence, and the record itself is not required: *Gilb. Ev.* 7, 8. In like manner the journals of either house of Parliament, the proceedings filed in the Court of Chancery, Admiralty, and ecclesiastical court, and the rolls of inferior jurisdiction, parish registers, entries in the books of corporations, or of other public companies, wherever the original, if produced, would be admissible, may be proved by examined copies: *Lynch v. Clarke*, 3 Salk. 153; *Skin.* 583; 1 *Phil. Ev.* 215, 404. Nor is it necessary to produce the appointments of justices, and other officers of the peace; proof that they acted in such capacity is enough: *Bunyan v. Wise*, 4 T. R. 366; *Leach*, *Ev. C.* 585. Also, proof may be made that a person is an officer of the revenue, *Stat.* 26 G. 3, c. 77, 82, or of the ecclesiastical courts or of the army, by reputation and the exercise of such office: 3 *Camp.* 432; 2 *ib.* 513. There are also cases in which the strict proof, otherwise requisite, becomes unnecessary, in consequence of the party's conduct having estopped him from disputing the fact: "*Admissions.*" The enrolment of deeds of bargain and sale under the *Stat.* 27 H. 8, c. 16, may be pleaded with a profert, by *Stat.* 10 Anne, c. 18, as may exemplifications of letters patent by 3 & 4 Ed. 6, c. 4, 13 El., c. 6. And examined copies of such enrolments are as good evidence as examined copies of the originals, 14 *East*, 291; except that, a copy of the enrolment of a bargain and sale of a chattel interest, or of any other deed enrolled for safe custody, is evidence only against the party who acknowledged the deed, and persons claiming through him: *B. N. P.* 256; 3 *Lev.* 587; 2 *Freem.* 259; and see 1 *Phil. Ev.* 442. An examined copy of the memorial of an assignment of a judgment is evidence of the fact of assignment, and the attested copy of the memorial of the registry of a deed is evidence of the fact of registry: 1 *Sch. & Lef.* 207. An examined copy of the enrolment of the memorial of an annuity-deed is evidence of the contents of the original memorial against an attorney, for negligence, who prepared and carried the memorial to be enrolled: 3 *Camp.* 20. [In cases of contracts executed in foreign countries according to their laws, the establishing of them in courts of common law by copies obtained in those countries at the time, the originals remaining there as records, must result from the circumstances. In assumpsit for freight on a charter-party executed at Java, it appearing that by the law of Holland such contracts are made by and before a notary and recorded in his official book, and a copy given to each party, (which may be done at any time,) signed, sealed, and attested by him; in the courts of Holland, these copies are received in evidence without further proof, but in Java, the notary's book must be produced, and the sig-

nature of the notary be proved; held that such copy could not be considered as the original binding document, nor admitted as evidence of it, until proved to be an examined copy according to the law of evidence prevailing in England: *Brown v. Thornton*, 1 Nev. & P. 339.]

*What must be done to admit of Secondary Evidence.*] Before secondary evidence is admissible, proof must be given that better could not be attained.

*Proof of Loss, &c. of best Evidence.*] If an original document be lost or destroyed, its execution must be proved, as also the loss or destruction of all its parts, before parol evidence of its contents will be received: B. N. P. 254: 1 Atk. 246; 1 Esp. Rep. 409. Such loss must be shown by the best evidence, as if a party deliver a letter to his daughter, and she and the witness, upon diligent search, were unable to find it, this is not sufficient to let in parol testimony of its contents, without calling the daughter. But, had the party kept it in his own custody, and set witness to search where his letters were kept, that would be sufficient: *Parkins v. Cobbett*, 1 C. & P. 149, 282. The degree of evidence required to prove the loss or destruction of any instrument, is in proportion to its value. Where a paper is useless, very slight evidence is sufficient: as where the clerk of the plt.'s attorney searched the plt.'s house for a policy of insurance (upon which the loss had been settled, and a second policy had been afterwards effected,) in an action for libel, secondary evidence was admitted, to prove the averment that the insurance had been made: *Brewster v. Sewell*, 3 B. & A. 296. And, in an action for a malicious prosecution, where the justice who took the examinations swore that he delivered them either to the clerk of the peace or his deputy, and the clerk swore that such papers, if the indictment be ignored, were usually thrown away, it was held unnecessary to call the deputy to prove \*them not in his custody, as it was his duty to deliver them to [\*782] the principal, and that plt. had a right to suppose they were in his custody: *Freeman v. Arkell*, 2 B. & C. 494. The legal custody of a parish appointment is in the officer most interested in its preservation, and his testimony is the best evidence of its loss, without which the production of the parish book, and proof that no appointments were kept by their parish, are insufficient to let in parol evidence, whether one or more overseers were appointed in a particular year: *R. v. Stoke Golding*, 1 B. & A. 173. The individual to whose possession an instrument can be traced, or in whom is the legal custody, or who may be presumed to have it in possession, is the person to be called to prove its loss, before secondary evidence can be given of its contents: 6 T. R. 236; 2 Bott. 353; 1 Stark. 139; 4 M. & S. 48; 1 R. & M. 18; 8 East, 278; 7 East, 66; 1 B. & A. 173.

*Proof of Possession of adverse Party, best Evidence, &c., and Notice to produce, when necessary.*] If paper be in the possession of the adverse party, secondary evidence of its contents is admissible; but it must first be sufficiently proved that the writing is in his or his privies' possession, and the degree of evidence required for this fact is stronger or slighter, according to the circumstances of each particular case: 3 Camp. 502; Peake, 76; 1 Stark. 338; 3 Bing. 164; 1 R. & M. 83, 156; B. N. P. 254; 1 Ph. Ev. 422. Next, it must be proved that notice has been given to

produce the writing: such notice however, is unnecessary, if from the nature of the proceedings, as in trover for a bond, the deft. has notice that he was to be charged with the possession of the instrument, *How v. Hall*, 14 East, 274, 4 Taunt. 865, 3 B. & P. 143, 1 Camp. 143, 2 Merivale, 461, Leach, C. 330, 6 East, P. C. 124; or if the party has obtained the possession by fraud, as from a witness served with a *subpœna duces tecum*: *Leeds v. Cook*, 4 Esp. Rep. 256. A counterpart of a deed may be read, without notice to produce the original: 5 T. R. 465; 7 East, 363; 8 East, 487. And, by the stat. 2 G. 2, c. 36, s. 8, in an action for seamen's wages, the captain is obliged to produce the ship's articles, and secondary evidence may be given of them, without notice: 2 Camp. 315; 3 B. & B. 288. As to the question whether the fact that the party has the deed in his possession in court, at the time of trial, dispenses with the necessity of notice to produce, see 4 Burr. 2484; 1 Stark. 283; 1 Phil. Ev. 425; 1 Stark. Ev. 362. Notice to produce a notice is unnecessary: 3 B. & B. 288. Notice to quit in ejectment, 2 B. & P. 41, notice of a dishonour of a bill, 2 Camp. 601, 1 Stark. 28, 5 Esp. Rep. 157, notice of action to a magistrate, 2 B. & P. 39, and the delivery of an attorney's bill, Peake Rep. 164, 2 B. & P. 237, 2 Camp. 110, may be proved by a duplicate or examined copy, without notice to produce the original. The notice to produce may be by writing or parol: 1 Camp. 440. It must specify the writing demanded, and notice to produce all letters is too general: 1 R. & M. 341. It must be served a reasonable time before the trial: 1 Stark. 283; 1 R. & M. 47, 327. When the writings pursuant to notice, are produced, if the party who demanded decline either to use or to inspect them, they are not thereby made evidence for the adversary; but, if inspected, though not used, they are; 1 Esp. Rep. 210; 5 Esp. Rep. 235. When the writings so examined are not produced, that circumstance does not afford any inferences against the party refusing, but entitles the other to give secondary evidence of their contents: 3 Camp. 363. Such evidence cannot be entered into by cross-examination, until the party giving notice has opened his case: 2 Stark. 23.

[*What sufficient Secondary Evidence.*] Where, from the circumstances of the case, primary evidence cannot be obtained, the secondary evidence given must be the next best; as, if a deed be lost, or not produced, the next best evidence is a counterpart: 6 T. R. 236. If there [\*783] \*be no counterpart, an examined copy; if no copy, parol evidence: 2 Atk. 71; 1 Esp. Rep. 409; 1 Camp. 192, 501; 1 Stark. 167; B. N. P. 254. And, if possession has gone along with a deed for many years, an old copy, or abstract, the original being lost, may be given, though not proved to be true, as the next best evidence: B. N. P. 254. Abstracts of instruments, entered in a memorandum-book, for the information of the witness, or of others, are not evidence; and though, if the witness have the book with him, he may refresh his memory by reference, its non-production is no objection to his parol testimony; 8 East, 279, 289. A copy in the letter-book of a merchant, proved to be in the handwriting of a deceased clerk, is evidence to prove the contents of a letter, which the deft. acknowledges to have received, and refuses to produce upon notice: 3 Camp. 305, 377; 1 Stark. 28. A copy by a copying-machine is evidence, if deft. refuses to produce the original: 3 Camp. 228; 2 Stark. 129. To prove the endowment of a vicarage, an old charterly of an ab-

bey, containing an account of the several matters of endowment, found in the possession of a person who had succeeded to a part of the abbey estates, was admitted as secondary evidence, search having been made for the original endowment: 2 Price, 399; 4 Dow. 324. After notice to produce the probate, the original will, under the seal of the ecclesiastical court, produced by the proper officer, is secondary evidence: 1 B. & B. 219. So, likewise, is the ordinary's register, against the devisee of the land, after notice to produce the will: B. N. P. 246. If a license to trade be lost, the next best evidence is the registry of it at the secretary of state's office, and parol testimony is not admissible to prove its contents: 2 Camp. 605; 2 Taunt. 237. Where the deft. upon notice, refuses to produce a deed, the examined copy is evidence, without proof of execution by deft., and though there be more parts than the one in his possession: 1 Esp. Rep. 409. So, if he refuse to produce the part which is stamped, the unstamped part is secondary evidence: 1 Camp. 501; 1 Taunt. 507. But, if neither part be stamped, no evidence whatever can be given of the contents: not parol, because the argument was reduced to writing; and not the writing, because unstamped: 2 B. & A. 478. Where a party refuses to produce a letter, its contents may be proved, by any person who can recollect them, as well as by the writer: 1 Stark. 167.

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### SEDUCTION, ACTION FOR.

**FORM OF REMEDY FOR, AND PLEADINGS.]** The form of remedy for the seduction of a person's servant, *per quod servitium amisit*, being an injury to the relative rights of a person, is by action on the case, 5 East, 39, 2 Chit. Rep. 260; or in trespass: 2 N. R. 476; 2 M. & S. 436. It is now more usual to declare in trespass; and when the injury is committed with actual force, or where there is an illegal entry of the father's house, or the like, trespass is more correct: *ib.*; 3 Camp. 526, *n.* A person cannot sue for the debauching of his *child*, merely in the character of a *parent*.

The venue is transitory. There is nothing peculiar relating to the form of the pleadings. It is not necessary to allege or prove that the deft. knew that the female was the servant of the plt.: Pea. Rep. 55. Where the female is not plt.'s daughter, or where the legitimacy may be questionable, omit the words "daughter and father," &c., throughout: *ib.*

Where the offence is accompanied with an illegal entry of the father's house, he may declare in trespass for the entry, and allege the seduction and loss of service as consequential: 2 T. R. 167; see form, 2 M. & S. 436. Where the plt. is put to expense in medical attendance, &c., or there be any other special damage, state such damages, 1 Ld. Raym. 259; see generally, *ante*, "*Crim. Con.*" The plea will be the general issue; and see *post*, as to what defences may be set up.

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#### \* *Precedents.*

[\*784]

(Commencement as *ante*, 419; *post*, "*Trespass.*") For that the said deft., heretofore, to wit, on the, &c., (any day about the time when the first intercourse took place,) and on divers other days and times afterwards, and before the commencement of this suit, to

wit, at, &c. (*venue*), with force and arms, &c., assaulted, debauched, and carnally knew one C. D., then and from thence hitherto being the (daughter and) servant of the said plt., whereby the said C. D. became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, on, &c., at, &c., aforesaid, she, the said C. D., was delivered of the child with which she was so pregnant as aforesaid, to wit, at, &c., aforesaid, by means of which said several premises, she, the said C. D., for a long space of time, to wit, from the day and year first above mentioned, hitherto became, and was unable to do or perform the necessary affairs and business of the said plt., so being her (father and) master aforesaid; and thereby he, the said plt., during all that time, lost and was deprived of the services of his said (daughter and) servant, to wit, at, &c., aforesaid. And also, by means of the said several premises, he, the said plt., was forced and obliged to, and did necessarily pay, lay out, and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the nursing and taking care of the said C. D., his said (daughter and) servant, and in and about the delivery of the said child, to wit, at, &c., aforesaid. To the damage, &c. (*Conclude as post, "Trespass."*)

### *Evidence for Plaintiff.*

Plt. must prove that the person seduced was his servant, the seduction of her, and the damages.

*Proof of Service.*] To support this action, there must be some appearance, at least, of the relation of master and servant subsisting between the plt. and the seduced party, at the time of the seduction, 1 Smith's Rep. 333; but, as the relation is, in these cases, little more than matter of fiction, made use of to support the action, 3 Stark. Ev. 1308, it is unnecessary to prove a *contract* of service, *ib.*; 2 T. R. 166; and it has been held, that occasionally milking cows, *ib.*, or even making tea, or other such slight matter, will be sufficient: *Carr v. Clarke*, 2 Chit. Rep. 261; 2 C. & B. 303. The age of the daughter is immaterial, provided it be not so young as to infer an impossibility of her being able to render any service, 2 T. R. 166, 6 East, 387, 4 B. & C. 660. The service need not be menial: Pea. Rep. 78, 306. If there be any contract of service in writing, such as a deed of apprenticeship, or the like, the same should be produced, and proved in the usual way: see 2 H. Bl. 511. The loss of service being the ground of action, the plt. need not be the parent of the party seduced; thus, an aunt may maintain an action for the seduction of her niece, Pea. Rep. 78; and, although the child be not the actual offspring, but merely an adopted child, the same principle will prevail: 11 East, 23. The party may sue, though the servant be a married woman.

If the daughter and servant leave her father's house with an intention of returning, this action may be supported, when the seduction was effected during her absence; but not if such intention of returning on her part did not exist, 2 T. R. 4, 5 East, 47; and, if the daughter sleep elsewhere than at her father's, and also perform the duty of a servant at the place where she sleeps, yet, if acts of service are rendered to her father by her, the action for seduction is maintainable, 6 Esp. Rep. 32; and, though she quit her father's house, and perform services entirely for the deft., if the deft.'s conduct be tainted with a wicked view of

[\*785] seducing her, the relation of \*master and servant would not exist between them, and consequently the father might maintain an

action against the deft. for the seduction: 2 Stark. 495.



*Proof of Seduction by Deft.]* This fact must be satisfactorily established: see the mode of proving the criminal intercourse, *ante*, 397. It must have taken place during the service: see *ante*, 784.

*Damages.]* The loss of service being the gist of the action, such loss must be established, 5 T. R. 361; and the amount of it will be the estimate of part of the damages. The loss of service need not be proved, however, where it is merely stated to increase the damages, as in an action for breaking plt.'s house, and seducing his daughter: S. N. P. 1099. The jury have, in some cases, been directed not only to consider the loss of service in the estimation of damages, but also to look to the wounded feelings of the parent, or the person standing in *loco parentis*: 11 East, 25; S. N. P. 1100; 3 Esp. Rep. 119; 3 Camp. 520. In aggravation, the plt. may show what other children he has, and the general good conduct of such children, and how they may be affected by the injury committed on the seduced: 3 Esp. Rep. 120. Plt. may also show, in aggravation, that the deft. visited the family as a suitor, 5 Price, 641. Until the character of the child has been impeached by the deft., the plt. cannot give in evidence her general good conduct: 1 Camp. 460; 3 *ib.* 519. The plt. should be prepared to show, if stated in the declaration, what expenses he has been put to in the cure of his child, 1 Stark. 287, or in consequence of her confinement, &c.: *Tullidge v. Wade*, 3 Wils. 19. It is not necessary to prove that a surgeon's bill has been actually paid, before the jury can take it into account; but, in the case of fees due to a physician, they cannot be allowed, unless they have been paid, as the father is not legally liable to pay them: *Dixon v. Bell*, 1 Stark. 289.

*Competency of Witness.]* The party seduced is a competent witness: 2 Str. 1054; 3 Camp. 519; Holt, 451.

#### *Evidence for Defendant.*

The Statute of Limitations, if pleaded, will bar the plt.'s right in this action, 6 East, 388, 2 M. & S. 436. The deft. may show that the daughter was not living with her parent, and that her intention was never to return; the fact of merely not living, without proof of her intention not to return, is not sufficient, 2 T. R. 4, 5 East, 47, *ante*, 784; he may also prove that the conduct of the plt. has been grossly neglectful, Pea. N. P. C. 316; and he may show that the tender age of the plt.'s daughter would preclude the possibility of service: 4 B. & C. 660; 7 D. & R. 133; *ante*, 784. Evidence of the bad conduct of the daughter may also be adduced by the deft. in mitigation: 1 Camp. 460; 3 *ib.* 520; 3 Esp. Rep. 116. Where deft. is accused of seducing away an apprentice, he may show that he knew not the fact of her being the servant of the plt., or that such fact afterwards came to his knowledge, but that no notice had been given him to deliver up the apprentice; 6 T. R. 221; he may also show that the plt. has enforced payment of a penalty which the servant has rendered himself liable to pay on quitting; and that, therefore, the service was at an end, and the plt.'s action barred: 1 W. Bl. R. 387; 3 Burr. 1345.

[\*786]

## \*SET-OFF.

PLEADINGS AS TO, 786.

PRECEDENTS, 787.

EVIDENCE AS TO, 788.—*Enactment of Statutes of Set-off, ib.*—*Between what Parties Set-off allowed, 789.*—*When Debt to be Set-off should be due, 790.*—*What Nature of Debt may be Set-off, ib.*

PLEADINGS AS TO.] A set-off, unless in an action at the suit of the assignees of a bankrupt, 1 Camp. 363, 12 East, 664, 1 T. R. 115, 6 T. R. 58, must be pleaded specially, and cannot be proved in evidence under the general issue; though, in *assumpsit*, or debt on simple contract, unless the subject-matter of the set-off accrued by reason of a penalty contained in a bond or specialty, the deft. has the option of pleading or giving notice of set-off with the general issue: B. N. P. 172; Willes, 262; Montague, *Set-off*, 40 to 47; 2 G. 2, c. 22, s. 13. A set-off means a *cross claim*, for which an action might be maintained against the plt., and is very different from a mere right to a *deduction* from, or reduction of, his demand, on account of some matter connected therewith, and which may be given in evidence under the general issue, such as a payment on account, &c.: 4 Burr. 2133; 4 Camp. 134; 1 Stark. 343; 2 B. & A. 137; 8 Price, 213. And, where demands, originally cross, have, by subsequent express agreement, been connected and stipulated to be set-off against, or deducted from, each other, the balance is the debt, and the only sum recoverable by the suit, without any plea or notice of set-off: *ib.*; 3 T. R. 599; 5 T. R. 135; 3 Taunt. 76. If either the debt sued for, or set-off, has accrued by reason of a penalty contained in any bond or specialty, the debt intended to be set-off must be pleaded, and the plea must show how much is truly due on either side, and the sum admitted in the plea to be due to the plt. is traversable: 5 T. R. 65; 6 T. R. 460; 8 G. 2, c. 24, s. 4. When the plt. elects to give a notice of set-off, such notice must be given at the time of plea of the general issue pleaded: 2 G. 2, c. 22, s. 13. In actions, such as covenant, or debt on a deed, where there is no general issue, the set-off must be pleaded: 1 Stark. 311; B. N. P. 181; Barnes, 191. A notice may be given, though several pleas be pleaded: 6 Esp. Rep. 50. Where the venue is in London or Middlesex, in general, a notice of set-off is given; but, where the venue is in the country, it is usual, to plead the set-off, on account of the expense of proving it.

The deft. is not *bound* to avail himself of his set-off, and may bring a cross action for the debt to him, 2 Camp. 595, 5 Taunt. 143; and, where he is not prepared, at the time the plt. sues him, to prove his cross-demand, it is most advisable not to plead or give notice of the set-off; for, in case he should go into evidence at the trial, in support of his cross-demand, and fail in the attempt, he cannot afterwards proceed in a cross-action for the amount, and a party cannot bring an action for what he has succeeded in setting-off, in a former suit against him; though, if the set-off were more than sufficient to satisfy the plt.'s demand in the former action, the deft. therein might then maintain an action for the surplus: 3 Esp. Rep. 104; 1 Chit. Pl. 486. If the amount to be set-off does not

amount to the plt.'s demand, the plt. may prevent any cross-action by allowing the set-off, and having it endorsed on the *postea*: 1 Camp. 252; Tidd, 650, 667.

The plea, or notice of set-off, should be framed like other pleas, and describe the set-off with sufficient certainty: 1 Chit. Pl. 495. Describing the set-off in the general way of the common counts in a declaration will suffice, if it would have sufficed to have entitled deft. to recover it, under \*such common counts: 2 Esp. Rep. 560, 569. A no- [\*787] tice of set-off, merely stating plt. to be indebted for the use and occupation, has been held insufficient, where plt. has held under a lease: B. N. P. 179. The several parts and items in the plea of set-off are considered as so many counts in a declaration, and the bad part only can be objected to: 2 W. Bl. R. 910.

The plt. may reply, denying the set-off, which is most usual. If the set-off is on or to an action on a bond, with a penalty, the plt. may traverse the amount due from plt. or traverse the deft.'s set-off: Holt, N. P. 293. If he should reply that more was due on the bond than the sum named in the plea, and fail in proving that allegation, he would be nonsuited: *ib.* The plt. might also deny the bond by replying *non est factum*, or may show a discharge thereof. If the debt attempted to be set-off has been barred by the Statute of Limitations, the plt., it has been held, may effectually reply that matter, or object it at the trial, if the deft. give notice of set-off, 2 Str. 1271, B. N. P. 180; but in a recent case it was decided, upon solemn argument, that the Statute of Limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*: *Chappel v. Durston*, 1 Crompt. & Jervis, 1. In general, however, the plt. may reply any other matter which a deft. in an action might plead. To a plea of set-off consisting of several demands upon a judgment, or recognizance of record and simple contract, the plt., in his replication, should give several answers: viz. as to the judgment or recognizance, *nul tiel record*; and, as to the simple contract, that he was not indebted, 1 East, 369; or he may reply, as to part, the Statute of Limitations. Where the deft. pleaded a set-off on a recognizance not of record, and on a simple contract, it was held the plt. should have merely denied the set-off, and not pleaded *nul tiel record*, 1 B. & A. 153.

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### Precedents.

#### PLEA OF SET-OFF FOR WORK AND LABOUR, &c.

(*Actio non, as ante*, 725.) Because he says that the said plt., before and at the time of the commencement of this suit, to wit, at, &c., (*venue*), aforesaid, was and still is indebted to him, the said deft., in a large sum of money, to wit, the sum of £—, of lawful money of Great Britain, for (*here state the subject-matter of the set-off, and nearly in the same manner as in a declaration. The following is the usual matter of set-off, viz.:*) For the work and labour, care, diligence, and attendance, of the said deft., by him, the said deft., and his servants, before that time done, performed, and bestowed, in and about the business of the said plt., and for the said plt., and at his request, and for divers materials, and other necessary things, by the said deft., before that time found and provided, and used and applied in and about the said work and labour for the said plt., at his like request; and also for divers goods, wares, and merchandises, sold and delivered by the said deft. to the said plt., at his like request; and for money by the said deft. before that time lent and advanced to, and paid, laid out, and expended for the said plt., at his like request;

and for other money by the said plt. before that time had and received to and for the use of the said deft., and for other money due and owing from the said plt. to the said deft. for interest upon and for the forbearance of divers large sums of money, due and owing from the said plt. to the said deft., and by the said deft. forborne to the said plt., for divers long spaces of time before then elapsed, and at his request; and for other money due and owing from the said plt. to the said deft., upon an account stated between them. (*Conclude the plea thus:*) Which said sum of money, so due and owing from the said plt. to the said deft., as aforesaid, exceeds the damages sustained by the said plt., by reason of the non-performance by him, the said deft., of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money, so due and owing from the said plt. to the said deft., he, the said deft., is ready and willing, and hereby offers, to set off and allow to the said plt. the full amount of the said damages, according to the form of the statute in such cases made and provided. And this, &c. (*Conclude with a verification, as ante, 725.*)

## NOTICE OF SET-OFF.

[\*788] \*In the K. B. (or C. P., Exchequer.)

Between } A. B., plaintiff,  
                  } and  
                  } C. D., defendant.

Mr. \_\_\_\_\_ (*the plt.'s attorney.*)

Take notice, that the above-named deft., on the trial of this cause, will give in evidence and insist, that the above-named plt., before and at the time of the commencement of this suit, was and still is indebted to the said deft., in the sum of £—, of lawful money of Great Britain, for (*here state the subject-matter of the set-off as in a plea:*) and that the said deft. will set-off and allow to the said plt., on the said trial, so much of the said sum of £—, so due and owing from the said plt. to the said deft., against any demand of the said plt., to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. Dated this — day of —, A. D. —.

Yours, &c.,

E. F., deft.'s attorney.

## PLEA OR NOTICE OF SET-OFF, IN AN ACTION BY OR AGAINST ASSIGNEES, EXECUTORS, &amp;c.

*In an action by or against assignees, executors, &c., the plea or notice of set-off is nearly similar to the above precedents; and states that the bankrupt, at the time of his bankruptcy, or the testator, at the time of his death, was indebted, &c. (omitting the words, "before and at the time of the commencement of this suit, was and still is;" and, after setting forth the subject-matter of the debt in the usual form, alleges, "which said sum of money is still wholly unpaid and unsatisfied; and the said plt., as assignee (or as 'executors') as aforesaid, before and at the time of the commencement of this suit, were and still are indebted to the said deft. in the amount thereof."*

See the various forms, stating the subject-matter of the set-off, in 3 Chit. Pl. 934 to 939.

## REPLICATION DENYING THE SET-OFF.

(*Precludi non, as ante, 782.*) Because he saith that he, the said plt., was not, nor still is, indebted to the said deft. in manner and form as the said deft. hath above in his said (second) plea alleged. And this the said plt. prays may be inquired of by the country, &c.

See other replications of *nil tiel record* to set-off on recognizance, 3 Chit. Pl. 1156; Statute of Limitations, *ib.*, 1159; replications in debt, *ib.*, 1173.

## Evidence.

The mode of proving a set-off will be precisely the same as if the deft. had brought an action for the demand. As to what conduct plt. should pursue on trial, if deft. will not set-off, *ante*, 786.

*Enactments of 2. G. 2, c. 22, and 8 G. 2, c. 24.]* As there was no remedy by the common law to enable the debt., in case of mutual debts, to strike the balance, and set it off in an action at law, it was enacted by the 2 G. 2, c. 22, s. 13, that "where there are mutual debts between the plt. and debt., or if either party sue or be sued, as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as, at the time of pleading the general issue, where any such debt of the plt., his testator, or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due: or, otherwise, such matter shall not be allowed in evidence upon the general issue." This was made perpetual by 8 G. 2, c. 24, s. 4; and to remove any doubt as to whether debts of a different nature could by \*set-off, it was further enacted by that act, that "mu- [\*789] tual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty, and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and, in case the plt. shall recover in such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to him, after one debt being set against the other aforesaid."

*Between what Parties a Set-off allowed.]* Mutual debts only can be set off against each other; therefore, as well the debt sought to be recovered, as that to be set off, must be due in the same right: therefore, a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one, unless it be so agreed by the parties, Tidd. 717; 5 M. & S. 439; Peake, Rep. 197; 2 Taunt. 170; *ante*. In an action on a policy, effected by the plt. in his own name, but in which others are interested with him, the debt. cannot set off a debt due to him from the plt. only: 5 M. & S. 439. But, in general, if a firm be carried on in the name of one person only, a separate debt due from that person only may set off to an action at the suit of all the partners: 7 T. R. 361; 2 Esp. Rep. 469. The directors or trustees of a company cannot set off a debt due to them as individuals, against a demand upon them in their corporate capacity, for stock, unless there was an express by-law to subject the stock of each member to a satisfaction of the debt which he owes to the company, in which case, such by-law being reasonable, the debt may be set off: 1 Str. 639. On the other hand, a debt on a joint and several bond may be set off to an action brought by one of the obligors, 2 T. R. 327; and, if such bond be executed by one only of the obligors, it may be set off to an action by him: *ib*. A debt due to the debt., as surviving partner, may be set off against a debt due to him from the plt. only: 5 T. R. 493. And a debt due from the plt., as surviving partner, may be set against a debt from the

the plt. to the debt, in his own right: 6 T. R. 582. Where A. and B. indorse a note to B., given them by C., in an action by B. (who carries on trade separately) as indorsee against C., the latter may set off a debt due from A. to B.: Peake, Rep. 197; 12 Ves. 346; 15 East, 130.

If a *husband* be sued on his own debt, he cannot set off a debt due to him in right of *his wife*, B. N. P. 179; nor can a debt due from the wife, *dum sola*, be set off against an action by the husband alone, unless the husband has, by some act, as a new consideration, &c., made the debt his own: 2 Esp. Rep. 514; 7 T. R. 348.

A debt, sued as *executor or administrator*, cannot set off a debt due to him personally, nor can a person, who is sued for his own debt, set off a debt due to him in his representative character: Willes, 263-4; S. N. P. 5 ed. 149. The statute does not allow the debt. to set off a debt due to him from the plt.'s testator, against a debt which accrued to the plt. in her representative capacity, after the testator's death, Willes, 103, 264, B. N. P. 180-1, 1 Bing. 99; [*Schofield v. Corbett*, 6 Nev. & M. 57;] and a debt. sued by an executor for money due to the testator, cannot set off the amount of a note given by the testator, but not due until after his death, and after action brought: 1 Bing. 93; 6 Taunt. 448.

To an action by a mere *trustee*, the debt. may, it seems, set off a debt due to him from the party beneficially entitled to the debt sought to be recovered: 1 T. R. 621; 2 W. Bl. R. 1271; Chit. Cont. 330.

[\*790] And, in "an action by an auctioneer, to recover the price of goods sold by him, as the property of A., it seems that the vendee may set off a debt due to him from A.: 7 Taunt. 237, 243; Chit. Cont. 330. But, to an action by assignees of a bankrupt, the debt. cannot set off bills held by him as trustee for another person: 16 East, 130, 136-9.

The statute relating to *bankruptcy*, the 6 G. 4, c. 16, s. 16, extends the law of set-off to *mutual credit*, between the parties: see the act, and *ante*, 254: Eden, B. L.; Archb. B. L. 257, 91, 96.

In an action brought by a *principal*, on a contract entered into by the *agent*, the debt. cannot set off any debt due from the agent, if he was known to the debt. to be acting on behalf of the plt.; but, if he did not know it, it would be otherwise: *Grove v. Claggett*, 7 T. R. 380, n. a. 359; 1 M. & S. 576. A commission, *del credere*, is a presumptive proof of an agent's dealing as principal: 7 T. R. 359. But this doctrine does not hold in the case of a mere *broker*: 2 B. & A. 137; 6 G. 4, c. 94; *ante*, 734. Where an agent sells goods as his own, or has a lien on them, and parts with the goods on the express agreement of being paid, and afterwards such agent sues for the price, the purchaser cannot set off a debt due to him from the owner to the purchaser, 2 Chit. R. 387, 7 T. R. 359; but it would be otherwise, if there was no such agreement: 7 Taunt. 243; 1 Moo. 178.

*When the Debt to be set off must be due.*] It is essential that the debt to be set off must be actually due at the commencement of the action; and it has, therefore been held, that a plea, stating that plt. was indebted at the time of the plea pleaded, is bad: 3 T. R. 186; 1 East, 576. A set-off, or deduction, cannot be made on account of money secured by a bill, &c., not due, when the suit was commenced: 1 Bing. 93. The debt to be set off must continue due at the time the plea was pleaded, and, if it be paid afterwards, plt. may, by pleading, show that fact. [Therefore, a plea

of set-off on a bill of exchange, payable to the defendant's order and accepted by the plaintiff, is not supported by proof of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded, it had got back into the defendant's hands: *Braithwaite v. Colman*, 4 Nev. & Man. 654.] [Where the plea of set-off alleged that the plaintiff *was* indebted in a certain sum, but omitted, "and still is," it was held bad on demurrer: *Dendy v. Powell*, 3 Mees. & W. 442.]

*What nature of Debt may be set off.*] It must be a legal and subsisting demand, and for which an action would lie by the debt. against the plt. A debt, therefore, barred by the Statute of Limitations, cannot be set off: 2 Str. 1271; Peake, Rep. 121. A set-off cannot be pleaded as to a bond of the plt., assigned to debt. by a third person, to whom, and for whose use, it was originally given: 16 East, 36. An attorney may set off a bill, though it has not been delivered in compliance with the statute, *ante*, 160; though indeed, it ought to be delivered time enough to be taxed, or early enough to prevent the plt. being taken by surprise at the trial: Doug. 115, 192; 1 Esp. Rep. 449. [Where the defendant in his set-off, sought to avail himself of overcharges paid by a third party, who settled previous bills; held, that he being dead, the accounts could not be opened: *Laroes v. Eastmure*, 8 Car. & P. 205.]

The debt claimed, and the debt to be set off, must be a *money demand*, and of a *liquidated nature*, and for which debt, or *indebitatus assumpsit*, would lie. A set-off cannot be allowed in covenant or assumpsit for general damages, 1 Esp. Rep. 378, 3 Camp. 329, 6 M. & S. 439; nor in debt on bond for the performance of covenants, B. N. P. 179, Willes, 261; nor in actions for torts, as trespass or case, replevin or detainee: *Montague on Set-Off*, 18; Tidd, 715; 4 T. R. 512. Nor can set-off be allowed for a demand for uncertain damages, or any unliquidated claim: such claim must be reduced or reduceable to a certain pecuniary amount: 5 M. & S. 442; 2 T. R. 32; Mont. 22. A demand for uncertain damages, though secured by a penalty, is not capable of set-off, as for not repairing, whereby debt. was obliged, or forced, to expend money, &c., 6 T. R. 488, for not insuring, 1 Taunt. 137, 2 Burr. 1024, B. N. P. 179, Willes, 261; or for not delivering goods according to contract: 1 W. Bl. R. 394. Nor can unliquidated damages (arising from fraud or breach of contract,) to be estimated by a jury be set off, 5 B. & C. 94, and *Auber v. Lewis*, therein cited; and the court said, that if the contract declared on is such as to entitle the party to special damages, the statutes of set-off do \*not apply: 3 Camp. 329; 2 W. Bl. R. 910; 1 Esp. Rep. 380. In [\*791] an action by a servant against his master, for wages, the latter cannot, in general, set off the value of goods lost, &c., by the plt.'s negligence, unless there was an agreement to make a deduction for such losses: 4 Camp. 134. Where a bill has a period to run, which the party has contracted to accept for the price of goods, a set-off is not allowable before the expiration of such period: 3 Camp. 329. And it would appear, that the price of goods bargained and sold, but not delivered, in consequence of plt.'s refusal to pay, may also be set-off: Peake, Rep. 641. Though the debt. agreed to pay ready money, he may yet avail himself of a set-off, in an action for goods sold and delivered, 1 East, 375, 1 Bing. 311-3, even where the set-off is a bill accepted by the plt., indorsed to the debt.

after the sale, and before the delivery of the goods, 2 M. & S. 512, provided such bill be really the deft.'s property. A penalty is not the subject of set-off, 2 Burr. 1024. In an action of debt on a policy of insurance, for an average loss which has been adjusted, premiums of insurance cannot be set off: 1 M. & S. 499; 5 *ib.* 539. But a set-off is allowed, where the sum to be recovered is stipulated damages, and not a penalty, 2 T. R. 86; or on a bond for the payment of an annuity: 2 Burr. 820. A judgment may be pleaded by way of set-off, and though a writ of error be allowed, 3 T. R. 188, *n. (c.)*, but not if the deft. be taken in execution, 5 M. & S. And the costs of a suit in Equity may be set off against the costs of an action at law: *Webber v. Nicholas*, 12 Moo. 87.

Where the money might be recovered under the common counts, the deft.'s set-off will be allowed, though the plt. declare specially: 4 Camp. 385. Where plt. brought an action, containing a special count for not indemnifying him as the accommodation acceptor of a bill in deft.'s favour, the court intimated that "deft. might have pleaded a set-off to that part of the count which charges the deft. with the amount of the acceptance paid by the plt.:" 5 B. & A. 95.

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### SHERIFFS, ACTIONS AGAINST.

**FORM OF REMEDY AND PLEADINGS.]** There is nothing peculiar relating to the form of the remedy or pleadings in an action against sheriffs. Case is the usual remedy against them, when acting ministerially: *Com. D. Action on Case, Misfeasance*, *A.* 1. Sheriffs, or other officers, when so acting, cannot be made trespassers by relation; therefore, if a sheriff, after a secret act of bankruptcy committed by A., levy his goods under an execution against him, he cannot be sued by the assignees in trespass, but only in trover: 1 Burr. 20; 1 T. R. 480; 1 Lev. 173; 1 Chit. Pl. 144. Trespass lies against a sheriff for taking the goods of a wrong person, 2 Camp. 576, 1 Chit. Pl. 115, 119; and see, further, as to the form of remedy against this kind of officers in general, *ante*, "*Officers*," "*Justices*." As to the form of remedy and pleadings against sheriffs for *escape*, or *false returns*, see *ante*, those titles.

All actions for a breach of duty of the office of sheriff, must be brought against the high sheriff, though for the default of the under-sheriff or bailiff: *Cowp.* 403; *Latch.* 187; 2 T. R. 151; 2 W. Bl. R. 832. He is not, in any case, entitled to a notice of action for any thing done by him in executing the process of the court: see 1 Bing. 369; 8 Moo. 400, *s. c.*

In justifying under a writ of execution, a sheriff need not state the judgment, *Cotes v. Michell*, 3 Lev. 20; but it is necessary for him to set forth the writ, it not being sufficient to allege generally that he committed the act complained of by virtue of a certain writ to him directed: 1 Saund. 298, *n. 1.* The bailiff must also set forth the warrant directed to him: *ib.* The sheriff or officer must also show that he has substantially pursued his authority: *ib.* Where the court out of which the writ issues has jurisdiction over the cause, although the proceedings whereon the writ is grounded be erroneous, or even the writ itself be  
 [\*792] irregular, yet the writ is \*sufficient for the sheriff's justification; even if the writ be set aside for irregularity, after being executed.



by the sheriff, yet it is sufficient to justify him: 2 Sid. 125; 1 Lev. 95. Where he justifies under a writ of meane process, it is necessary for him to show the writ returned, 1 Salk. 409; but this is unnecessary in a plea by a sheriff's bailiff: Cro. Car. 446. The sheriff may justify acting under a *ca. sa.* or *fi. fa.*, without having returned them: Cowp. 18; 10 East, 82; Cro. El. 237. In an action of trespass against the sheriff or his officer, jointly with the plt. or his attorney, it is advisable for the sheriff to justify separately; for, if the justification be joint, and it be bad for the plt., it will be bad for the sheriff and his officer also; whereas, if he had justified alone, it would have been a good justification for the sheriff or his officer: *Phillips v. Biron*, Str. 509, 993, 1184. As, if the officer and plaintiff justify under a *ca. sa.* together, they are bound to show a regular judgment; whereas it is sufficient justification for the sheriff to show the writ without the judgment: 3 Lev. 20; see Watson on Sheriff, 84-5.

*EVIDENCE of Cause of Action.*] This will, in general be the same as in other cases: see *post*, "*Trover*," "*Trespass*." In an action for *not paying over money levied*, the writ of execution must be proved, *post*; "*Writ*," as also the levy, under it. The levy may be evidence by the return on the writ of the levy, *Dale v. Burch*, 3 Camp. 347, or else by the sheriff's officer, or party present. In an action for levying a tenant's goods in execution, without paying a year's rent, the plt. must prove the demise, and rent in arrear, Doug. 640; *Harrison v. Barry*, 7 Price, 690; as also the levy and removal of the goods, or some of them, *Colyer v. Speer*, 2 B. & B. 67; that the sheriff had notice according to the 8 Anne, c. 14, s. 1, *Andrews v. Dixon*, 3 B. & A. 654, *Arnett v. Gurnett*, 3 B. & A. 441, *Smith v. Russell*, 3 Taunt. 400; and the value of the goods. The proofs must substantially agree with the facts stated in the declaration. As to evidence in actions for an *escape*, or *false return*, see those titles.

On principles of public policy, a sheriff is liable civilly for the trespass, extortion, or other wilful misconduct of his bailiff, when acting as such under the express or implied authority of the sheriff, 2 T. R. 154, 3 Wils. 317; when he is not so acting, see 6 B. & C. 739; 7 D. & R. 193; *infra*; 9 Price, 287; 5 Moo. 183.

*How to connect Sheriff with his Officer.*] In all cases where the action is against the sheriff, as the immediate wrong is not done by him, but by his officer, the evidence must, by establishing the connection between the sheriff and his officer, be brought home to the sheriff. This may be done through the medium of the warrant in that action, directed to the sheriff's officer: though this, indeed, is not the only medium by which the privity of the sheriff with the acts of his bailiff may be established: *Martin v. Bell*, 1 Stark. 417. Where the warrant remains in the officer's custody, as it usually does when executed, the bailiff should be served with a *subpœna duces tecum*, to produce the original warrant. Where it has been returned, a notice should be served to produce it, and secondary evidence will be admissible. But the privity between the bailiff and the sheriff must be established by the best evidence in the particular case; and it is, therefore, insufficient to show, even by the evidence of the under-sheriff, that the person who seized the goods, was, in fact, an officer, and the warrant directed to him, *Drake v. Sykes*, 7 T. R. 113; nor is it sufficient to produce an examined copy of the precept, with the bailiff's

name indorsed on it, though the bailiff has returned *cepi corpus*: 1 Stark. 413. And it has been also held insufficient, where the bailiff's name was written on the margin: *Jones v. Wood*, 3 Camp. 228; Holt, C. 217; 7 Taunt. 8; 2 Stark. 314; 5 Moo. 183; *ib.*, 184 n.; 3 B. & B. [\*793] \*27. But, in an action for an escape, the sheriff's authority for appointing a bailiff was proved by a person belonging to the sheriff's office, who had indorsed the bailiff's name on the writ produced, and the court refused to set aside the verdict, holding that this proof was sufficient: *Formis v. Neave*, 3 B. & B. 26. And, in an action against the sheriff, it has been held sufficient, for the purpose of connecting him with his bailiff, to produce the writ, with the name of the bailiff indorsed on it, in the sheriff's office: it being the course in the sheriff's office to indorse upon the writ the name of the bailiff by whom it is to be executed: *Tealby v. Gascoine*, 2 Stark. 202. Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff, while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it, it was held, that proof of notice to the sheriff's attorney to produce it, was sufficient to entitle the party to give parol evidence of its contents: *Taplin v. Atty*, 3 Bing. 164. Proof of a document produced, on notice given from the sheriff's office, containing an order to a bailiff to give the necessary instructions for making a return to the writ in question, and containing his answer, is sufficient to show that he was the agent of the sheriff in the execution of the writ: *Jones v. Wood*, 3 Camp. 228; and see 1 Stark. 416. [See further as to the evidence necessary to connect the sheriff with the act complained of: see *Gibbons v. Phillips*, 2 M. & R. 238; 7 B. & C. 529, 535, n. *Scott v. Marshall*, 2 C. & J. 238; 2 Tyr. 257. *Sargent v. Cowan*, 5 C. & P. 492; 1 C. & M. 491; 3 Tyr. 538.]

The bailiff must be acting under the express or implied authority of the sheriff: 9 Price, 287; 5 Moo. 183. Where a sheriff's officer had seized, under a *fi. fa.*, goods of a trader, more than sufficient to satisfy the levy, and the trader had become bankrupt, and assignees were chosen before the goods were sold, the assignees authorized the officer to deliver the whole of the goods to A. B., and to receive from him a certain sum, as the full value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees, it was held that they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole goods from the sheriff, but from the plts., the assignees: *Cook v. Palmer*, 6 B. & C. 739.

*Evidence for Sheriff.]* The sheriff should be prepared to show all the facts he intends setting up as a defence. As to proof of plea of justification, see *ante*, 792. In trover by a stranger, for goods seized and sold under a *fi. fa.*, against a sheriff, or a person claiming under a bill of sale from the sheriff, the judgment must be proved: 5 Burr. 2631; but it is not necessary, where the action is by deft. himself, or his assignee, if he has become a bankrupt: 1 Ld. Raym. 733; 3 M. & S. 110; 1 Bing. 209. As to mode of proof of judgment, *ante*, 755; as to proof of mode of proving writ, *post*, "Writ."

*Admissions of Sheriff's Officers, &c.]* We have already considered partially how far such admissions will be evidence: *ante*, 483. A bailiff's

admissions are not evidence against the sheriff, without showing that the bailiff had authority in the particular instance in which he was acting: 1 Camp. 391, *n.* [and unless the admissions accompany some official act of the deputy, or tend to charge himself. And, therefore, in an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, are not admissible to prove that the bailiff charged with having committed the extortion, was the sheriff's authorized agent: *Snowball, q. t. v. Goodricke*, 4 B. & Adol. 541.]

In an action against the sheriff for a false return to a writ, what was said by the bailiff, to whom the warrant under it was directed, when asked by the plt.'s attorney, before the return of the writ, why he did not execute it, is evidence against the sheriff: *North v. Sheriff of Middlesex*, 1 Camp. 389. So, declarations made by him whilst the party was in custody, may be given in evidence, in an action for an escape against the sheriff: *Bowcher v. Sheriff of Wilts*, 1 Camp. 391. The under-sheriff's admissions, whilst acting in that character, are always evidence against the sheriff: *Drake v. Sykes*, 7 T. R. 116.

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\*SLANDER, ACTION FOR.

[\*794]

FORM OF REMEDY, 794.

FORM OF PLEADINGS, *ib.*—*Declaration*, 794 to 801.—*Plea*, 801, 804.—*Replication*, 804.

PRECEDENTS, 805.

EVIDENCE FOR PLAINTIFF, 807.—*Proof of Inducement, ib.*—*Of Malice*, 808.—*Of Colloquium, and that the Slander was of Plaintiff, and Matter alleged, ib.*—*Of Publication of Written Slander, ib.*—*Of Publication of Verbal Slander*, 811.—*Of Innuendoes, ib.*—*Damages, ib.*

EVIDENCE FOR DEFENDANT, 812.—*Under Plea of Not Guilty, ib.*—*Under Plea of Justification, ib.*—*In Mitigation of Damages, ib.*

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*Form of Remedy.*

THE only civil remedy for injuries to character and reputation occasioned by slander, is by special action on the case: 1 Chit. Pl. 128.

Two persons cannot, in general, join in an action for slander: 2 Saund. 117, *a.* But, when an injury is committed to the wife, by slander, during the coverture, the husband must join; but, if the words spoken of the wife, not being in themselves actionable, occasion special damage to the husband, he must sue alone: 1 Chit. Pl. 62. If defamatory words be spoken of partners in trade, whereby they are injured in their trade, they may sue jointly: *Cook v. Batchellor*, 3 B. & P. 150. A joint action may be brought against several, for composing and publishing a libel, 2 Saund. 117, *a.*, Latch. 262, but not for verbal slander: 2 East, 573; 2 Wils. 227; Dyer, 19, *a.* An action against husband and wife does not lie for the slander by both, 2 Wils. 227, Dyer, 19, *a.*; but it lies against them for the slander by the wife only: *ib.*

*Form of the Pleadings.*

**DECLARATION.]** The *venue* is transitory: see 1 T. R. 571, 647.

**Inducement.]** It is usual, in all cases, to commence the declaration with a statement of the plt.'s good character, and of his innocence of the crime imputed to him by the defendant, Com. D. *Action for Defamation*, G. 1, 5 East, 467: but, as these inducements are not traversable, see Styles, 118; 1 Lev. 297, they may be omitted, and the declaration may commence with a statement of deft.'s malicious intention to injure the plt. When the libel or slander does not affect the plt. in his moral character, but merely imputes to him insolvency, or incapacity in the way of his trade, &c., this general inducement of good character is inapplicable, and the declaration should commence with an inducement respecting the trade, &c.: 2 Saund. 307; 1 Saund. 242, *a. n.*; 2 B. & P. 284. Where the words do not materially and *per se* convey the meaning the plt. would wish to assign to them, and are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show they were actionable, it must be stated and proved that such matter existed, and this is best done by way of inducement: 8 East, 431; 9 East, 93; 4 M. & S. 164; 13 East, 554. The special inducement being material and traversable, time and place should be stated: 4 T. R. 560, 590. When any of the counts are for matter slanderous and actionable, without inducement or reference to extrinsic matter, the inducement should be qualified, and confined merely to those counts which require an inducement. [\*795] The inducement, when "material and connected with the slander, must be proved as stated: see *post*. What a variance under the *colloquium* and *innuendoes*, and how to prove inducements: *post*.

**Statement of Malice.]** The declaration must show a malicious intent in the deft., but it is not necessary to use the word "*maliciously*," for the word "*falsely*," alone, has been held expressive of a malicious intent: Moo. 459; Owen, 51; Noy, 85. Indeed, in Sty. 392, *Anon. Rolle, C. J.*, was of opinion that, in a declaration, it is unnecessary to use either the words *falsely*, or *maliciously*, though in an *indictment* or *information* it is otherwise: he meant, perhaps, that after *verdict* the omission of them in a declaration would be helped. So, in an action for slander of title, it is necessary to allege and prove malice: 1 Saund. 242, *n.*; 4 Burr. 2422, *Hargrave v. Le Breton*; 3 Taunt. 246, *Smith v. Spooner*. In an action for words, stating that the deft. spoke the *false* words would suffice: 1 Rep. 273.

**Statement of Publication.]** The declaration must show a publication of the slander; otherwise, the action does not lie; and therefore it is averred in the declaration that the deft. spoke the words in the *presence* and *hearing* of several persons; but these words, though usual, are not essential, and any others denoting a publication are sufficient, as that the deft. spoke the words "*palam*" or "*publice*:" Cro. El. 861. So, alleging the words to be spoken in the *presence* of several persons, omitting the word "*hearing*," is sufficient, for it shall be intended to be in their hearing: Cro. El. 486; Cro. Jac. 39; Cro. Car. 199. In stating a libel, the word "*published*" is not absolutely necessary, and the words "*printed*"

and caused to be printed" have been holden sufficient: 2 Bl. R. 1037; 1 Saund. 242, *n.* 1; Com. D. *Action for Defamation*, G. 4. A statement that the deft. published, or caused to be published, is sufficient, and the uncertainty may be aided by the deft.'s pleading: 8 Mod. 328; *Vin. Ab. tit. Libel, E. Pl.* 4. As the declaration must show a publication, if the words are in a foreign language, the plt. must aver that the hearers understood such language: Hob. 268, Cro. El. 865; *Price v. Jenkins*, 1 Roll. Abr. 74, (*A.*) Unless, indeed, with respect to Welsh words, and the action is brought in any of the courts of great session in Wales, for it shall be intended the hearers understood the words: Hob. 126, *infra*. Stating deft.'s conversation to be in the presence and hearing of a particular person, will not preclude plt. from showing it was in the presence of others: 2 B. & A. 756. And he need not prove they were spoken before such person: B. N. P. 6.

*Statement of Colloquium, and that Slander was of and concerning Plaintiff, and Matters alleged.*] It is necessary to state, that the slander was of and concerning the plt., and the preceding inducements: 4 M. & S. 164. In an action for words, notwithstanding a *colloquium* is laid to have been had by the deft. with other persons of and concerning the plt., it still seems necessary to introduce the slanderous words, by an averment that the deft. spoke them *of and concerning* the plt.; otherwise, it will be insufficient, upon a special demurrer; for though, perhaps, after verdict, or on a general demurrer, it will be intended that the words were spoken of the plt., and that the *innuendo* connects the word *he* with the plt., of whom it is said, in the former part of the declaration, that the deft., had had a discourse, yet, as it is necessary to aver that the deft. spoke the words of the plt., that cannot be supplied by inference or argument, when the omission of the averment is specially pointed out as a cause of demurrer; but, where no *colloquium* is laid to have been had by the deft. of the plt., there seems to be no doubt that the omission of such an averment is fatal on general demurrer, or after verdict, 2 Roll. Rep. 244; as, where the plt. declared that the deft. said these words, "he," (meaning the said plt.) "is a thief," &c. without an averment [\*796] that the words were spoken *to* the plt. or *of* him, according to the usual course, the declaration was held ill, because it did not appear of whom the words were spoken, and the *innuendo* was held not to help it; and yet there was laid a *colloquium* of the plt., and that the deft. said these words, "he," &c.: 1 Roll. Abr.; 83, *pl.* 7; 85, *pl.* 7.; S. P.; Cro. Jac. 126; *ib.* 39; 1 Sid. 52; *Lowfield v. Bancroft*, 2 Str. 934. But, where it is laid that the deft., in a discourse with the plt., said, in the second person, "you," (meaning the plt.) "are a thief," &c., the declaration is sufficient, though the plt. does not allege that the words were spoken *to* the plt. of him, for it cannot but be intended that the words were spoken *to him* with whom the conversation is alleged to have been had: 1 Rol. Abr. 85, *pl.* 8. And, where it is laid that the deft., in a discourse with the plt. said to him, "you," &c. there is no need of an *innuendo*, for it is plain enough without it, that "you" means the plt.: 2 Rol. Rep. 243, 244.

Whenever an inducement of extrinsic matter is necessary, it is necessary to aver that the slander was published of and concerning it, and that it related thereto, and the same must be proved: 2 Saund. 307; 8 East,

427; 1 Saund. 242. But the whole matter of inducement to which the averment refers, need not be proved, if it be not essentially connected with the slander subsequently stated: see 3 B. & C. 113, 138, &c.: 4 D. & R. 670. If the declaration allege that the plt. carried on two trades, and that the words were spoken of and concerning him in the way of the trades, it will be sufficient to prove that the plt. carried on one of his trades, provided the words proved apply to him in that trade: *Hall v. Smith*, 1 M. & S. 287; *Figgins v. Cogswell*, 3 M. & S. 369. See also, as to introductory averments being divisible, 4 M. & S. 532. And, where an averment relates to introductory matter in a declaration, it is not necessary to prove precisely that such averment relates to every part and particular of the matter so previously set out, if it is proved to relate substantially to the cause of action; as, where a declaration for a libel set out that plt. was an attorney, and had been employed as a vestry-clerk, in the parish of St. Matthew, Bethnal Green, and, whilst such vestry-clerk, certain prosecutions were carried on against J. Merceron, and in furtherance thereof, and to bring the same to successful issue, certain sums of money belonging to the parishioners were applied to discharge the expenses of the said proceedings, yet deft. intended to injure plt. in his profession, and in his office of vestry-clerk, and caused it to be suspected that he had fraudulently applied the said money, and published of and concerning the plt., and of and concerning his conduct in his office as vestry-clerk, and of and concerning the matters aforesaid, the libel; but, in evidence, it appeared that the libel charged the money to have been applied to discharge the expenses, after the proceedings had terminated: this was contended to be a variance, as, from the allegation of and concerning the matters aforesaid, and in the declaration, plt. must prove that the libel related specifically to any one of the matters previously alleged, which it could not do, as the libel charged the misapplication of money, not before, but after the prosecution of Merceron; but the court held, that it was immaterial to the defamatory character of the libel itself, whether the money was paid before or after the prosecution, and that it was sufficient, as the plt. had matters previously alleged, by way of introduction; therefore, such allegation being immaterial to the character of the libel itself, it was unnecessary to prove it: *May v. Brown*, 3 B. & C. 143; 4 D. & R. 670. So, general averments, though in one entire sentence, when they include separate particulars, may be construed in the same manner as if they had been separate allegations, relating to separate particulars; therefore, in the last recited case of *May v. Brown*, and in reference to the facts of that case, *Littledale, J.*, observed, "that the allegation that the libel was of and concerning such and such things did not amount to a specific description of the libel (that is, [\* 797] "of each particular charge), but to a description of the nature of the injury the plt. had sustained, and that, when the declaration alleged the libel to be published of and concerning the plaintiff, and of and concerning his conduct as vestry-clerk, and of and concerning the matters aforesaid, that, *reddendo singula singulis*, it may be considered in the same light as if the words of and concerning had followed each of the previous averments:" *ib.* 187. When averments refer to introductory matter, it is material to consider whether the proposition to which they refer is an entire one, or consists of distinct parts, and, in the case of libel, whether it is sufficiently connected by innuendo, with a particular

allegation; and therefore, in the last case of *May v. Brown*, it was said, with reference to the *King v. Horne*, Cowp. 72, (which was for a libel of and concerning his majesty's government, and of and concerning the employment of his troops, and where it was held,) that if the prosecutor failed in proving either branch of that proposition, he failed in *toto*. But there the libellous matter was of and concerning *one entire proposition*, and not of *two distinct* and separate branches of the proposition: *ib.* 138. And where a declaration for a libel stated that the plt. was an attorney, and that the deft., intending to injure him in his good name, and in his said profession of an attorney, published a libel of and concerning the plt., and of and concerning him in his said profession, and, at the trial, the plt. failed in proving that at the time of the publication of the libel he was an attorney, it was held that this was not a fatal variance between the allegation and the proof, the words of the libel being actionable, although not used with reference to the professional character of the plt.: *Lewis v. Walker*, 3 B. & C. 136, *b.*; 4 D. & R. 810. But, where the fact stated in the introductory averment, and connected with the libel by the words "of and concerning," is material to the defamatory character of the libel itself, it must be proved as stated; thus, where the declaration stated in the first count, that the plt., a constable, had apprehended persons stealing a dead body, and had carried the body to Surgeons' Hall, and that the defendant published the libel "of and concerning the plt.'s said conduct," and, in the second count, stated that defendant published a certain other libel, "of and concerning the conduct of the plt. respecting the said dead body;" it was held a variance upon both counts, that the plt. did not prove that he had carried the body to Surgeons' Hall, *Teesdale v. Clement*, 1 Chit. Rep. 603; and, *per cur.*, *ib.* "the fact which has failed in proof is very material to the libel itself, for the libel is, with respect to the plt.'s conduct to this dead body; and, if the plt. is charged with carrying this body, amongst other places, to Surgeons' Hall, it certainly is most important to prove that part of the conduct." So, in an action for words, charging the plt. with having stolen some soap, where the declaration alleged that the words had been spoken of and concerning certain soap, which B. had asserted to have been stolen out of his yard, and it appeared in evidence that B. had asserted that the soap had been taken out of his yard, *Abbott, C. J.*, held the variance as fatal: *Shepherd v. Bliss*, 2 Stark. 510.

*Statement of the Libel or Words.*] It is usual to state the slander was the "matter following," which is sufficient to let in the plt. to show the slander stated, in *substance*, corresponded with the slander used: 2 Salk. 660-1. It would be improper to state that the slander was "to the effect following:" 2 Salk. 417, 6 Taunt. 169; or, "to the substance following:" 3 B. & A. 503; 3 M. & S. 115; 4 B. & C. 473; 6 D. & R. 728.

The libel itself, and not the effect of it, must be set out in the declaration; and hence it is not sufficient to state that the deft. published a libel, "purporting that the plt.'s beer was of bad quality, and by deficient measure," &c., for such a mode of statement deprives the deft. of taking the opinion of the court upon the words of the libel:

\**Wood v. Brown*, 6 Taunt. 169; 1 Marsh. 522, *s. c.* So, in [\*798] actions for verbal slander, the words must be stated, 3 M. &

S. 110; a count merely alleging that the deft. "falsely and maliciously charged and asserted, and accused the plt. of being in insolvent circumstances," without setting out the words, was held bad, *ib.*; but such general statements would be cured by a verdict: 3 D. & R. 519; 2 B. & C. 283, s. c. In an action for a libel in a 'foreign language, the original must be set out, and not a mere translation only: *Zenobio v. Axtell*, 6 T. R. 162; *ante*, 795, and see *ib.*, as to words. But it does not seem necessary, though usual to give the signification of such foreign words in the declaration, for the court will inform themselves by those who understand the language what the words mean in *English*: Hob. 126; 1 Rol. Ab. 86, (L.) pl. 5. And it is safer not to translate the words, for it has been held, that where the words in *Welsh* signified that the deft. was *perjured*, and were therefore actionable, but the translation into *English* did not amount to perjury, but only that the plt. was *forsworn*, no action would lie: Sty. 263. But it should seem that it would now be held necessary to set out a translation in the declaration, for in *Rex v. Manasseh Goldstein*, which was tried at the Old Bailey, the prisoner was found guilty upon an indictment framed on the statute 43 G. 3, c. 139, for forging an instrument purporting to be a treasury note, or receipt of the Prussian government. The case was afterwards argued before ten of the judges, *abs. Bayley, J.*, and *Wood, B.*, on 4th February, 1822, and a majority of eight to two of their lordships held that the indictment was bad, for want of a translation of the instrument, which was in German: 3 B. & B. 201. The reason appears to have been, that it was considered the court ought to have the instrument before them in a language which they understood, for the purpose of affording them the means of deciding whether it was within the statute: *Bayley on Bills*, 445. It is an established rule, that slanderous words must be understood by the court in the same sense as the rest of mankind would ordinarily understand them in: therefore, where one said of another, "that his character was infamous, that he would be disgraceful to any society, that those who proposed him as a member of any society must have intended an insult to it, that he would publish his shame and infamy, that delicacy forbade him from bringing a direct charge, but it was a male child who complained to him;" these words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an *innuendo* to that purpose, which it was admitted would not enlarge the sense: *Woolnoth v. Meadows*, 5 East, 463. "The rule which at one time prevailed, that words ought to be understood in *mitiori sensu*, has been long ago superseded, and words are now understood by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them:" *per* *Ld. Ellenb., C. J.*, in *Roberts v. Camden*, 9 East, 95. To be actionable in themselves, the words when only spoken, not written, must be such as, in their plain and popular sense, convey to the minds of the hearers a charge of some offence for which the plt. is amenable to the law, or of *having* some disease which will exclude him from society, see S. N. P. *Slander*; and the jury must be satisfied that the deft. used the words in the sense imputed, *ib.*; see 1 Saund. 242, notes by *Patteson & Williams*.

If different parts of a libel, not following each other, be set out in the same count, it is inaccurate to describe it as an entire libel, and the parts



should be set forth thus: "in one part of which said libel there was and is contained the following false, &c., matter of and concerning the said plt., that is to say, &c., (stating that part of the libel, and then say,) and in another part of which said libel there was, &c.," 1 Camp. 353.

A material variance from the substance of the libel or words stated, and that proved, would be fatal. Where a libellous matter contained two references, by which it appeared to be, in fact, the language of a third \*person, speaking of the plt.'s conduct and the [\*799] declaration, in setting it out, had omitted those references, it was held, that these omissions altered the sense of the remainder, and that the variance was fatal: 5 B. & A. 615: 13 East, 554; see as to proving, whether there be any meaning in a paper alleged to be a libel, beyond what appears on the face of it, *Humphrey v. Miller*, 4 C. & P. 7. The slanderous words should be stated in substance as they were uttered: 3 M. & S. 110; 1 M. & S. 287. Proof of words spoken in the third person will not support a count for words spoken in the second person, and *vice versa*: 4 T. R. 217; B. N. P. 5. Words stated as spoken of a thing present, when they were spoken of a thing absent, would be a variance: 2 B. & A. 756. Words spoken by way of interrogation will not support a declaration for words spoken affirmatively: 8 T. R. 150; see, further, 2 Stark. 194, 510; 7 Taunt. 431; 4 C. & P. 268. The addition or omission of a word will not prejudice, unless it alter the sense, B. N. P. 5; and plt. need not prove all the words laid,—it will suffice for him to prove as much of them as would by themselves support the action: 2 East, 438; 2 W. Bl. R. 790; 2 Saund. 74, *b*.

*Statement of Innuendo.*] An innuendo is only explanatory of some matter already expressed; it serves to explain words doubtful in their meaning, or which do not in themselves show the slander intended to be conveyed by them, *Stockley v. Clement*, 12 Moo. 376. An innuendo may apply to what is already expressed, but cannot add to or enlarge, or change the sense of the previous words: 1 Saund. 243 *n*. 1; 2 Salk. 513, *s. c.*; 1 Ld. Raym. 256; 12 Mod. 139; *Roberts v. Camden*, 9 East, 93. In *Rex v. Horne*, Cowp. 684, *De Grey, C. J.*, in delivering the opinion of the Judges in the House of Lords, adopts the above definition of an innuendo as given out of *Salkeld*: "An innuendo," says he, "means nothing more than the words '*id est*,' '*scilicet*,' or '*meaning*,' or '*afore-said*,' as explanatory of a matter sufficiently expressed before, as such a one, *meaning* the deft., or such a subject, *meaning* the subject in question. But, as an innuendo is only used as a word of explanation, it cannot *extend* the sense of expressions beyond their own meaning unless something is put upon the record for it to explain; as in an action upon the case against a man for saying of another, 'He has burnt my barn;' the plt. cannot by way of innuendo, say, meaning 'his barn *full of corn*,' 4 Esp. Rep. 20, *a*. *Barham's case*: because that is not an *explanation* of what was said before, but an *addition* to it. But, if in the introduction it had been averred that the deft. had a barn *full of corn*, and that, in a discourse about that barn, the deft. had spoken the words of the plt., an innuendo of its being the barn full of corn would have been good, for, by coupling the innuendo with the introductory averment, 'his barn full of corn,' it would have made it complete. So, in an action on the case for saying that the plt. was foresworn, he cannot, by way of innuendo,

say, meaning, 'that he had perjured himself in his answer to a bill filed against him;' but, if the declaration had contained a *colloquium* respecting an answer averred to have been put in on oath by the plt. to a bill filed against him, in which he was charged to be forsworn, the innuendo would have been good: *Hawkes v. Hawkey*, 8 East, 427; see, also, *Holt v. Scholefield*, 6 T. R. 691, *s. p.* In *Inchin's* case, 5 St. Tr. 590, one part of the libel was this, "the mismanagement of the navy have been a greater tax upon the merchants than the duties raised by Parliament." In order to explain what was meant by the navy, the information stated in the *introductory* part, that "of and concerning the royal navy of this kingdom, and the government of the said navy, it is written so and so." When the information came, in stating the libel, to the word "navy," by an innuendo, it explains it thus, meaning the royal navy of this kingdom, which, being coupled with the averment in the introductory part of it, made the sense and the charge complete: see the case of *Rex v. Matthews*, 9 St. Tr. 682, cited in 1 Saund. 243, *n.* In the case of *Rex v. Alderton*, Say. Rep. 280, the libel was an advertisement, reciting certain orders made for collecting money on account of the distemper

[\*800] \*amongst the horned cattle, advertised by the clerk of the peace for the county of *Suffolk*; and it charged, that, by these orders, the money collected had been improperly applied. The information charged this to be a libel on the justices of *Suffolk*. In the body of the libel it was not so said *by the order of the justices*, nor did the information in the introductory part say, that it was a libel "of and concerning the justices of *Suffolk*." But, when the information came to state any of the orders in the advertisement, it added this innuendo, "meaning an order of the justices of peace for the county of *Suffolk*." But these innuendoes could not supply the want of an averment in the introductory part, of its being written *of and concerning the justices*, because they were not explanatory of, but in addition to, the former matter; and the court were of opinion that, the information having omitted the words "of and concerning the justices" in the introductory part, such omission was fatal, and judgment was accordingly arrested: see 1 Saund. 244. [Where the declaration only alleged an intention to impute misconduct, and that the defendant maliciously published a notice, "that any person giving information where property belonging to the plaintiff, a prisoner in the King's Bench prison, might be found, should receive five per cent. on the goods recovered,"—an innuendo, that thereby the plaintiff had been guilty of concealing his property with a fraudulent and unlawful intention, was held bad, on demurrer, as enlarging the meaning of the terms used: *Gompertz v. Levy*, 1 Perr. & Dav. 214.]

When the new matter stated in the innuendo is not necessary to support the action, it may be rejected as surplusage, 9 East, 95; an innuendo may however, narrow and limit the plt.'s case in proof. Thus, in an action for words which may be understood to convey a charge of felony or fraud, although they would be actionable in the latter sense as well as the former, if the declaration contain an innuendo that the deft. thereby meant to impute felony to the plt., this is material, and must be proved as alleged; 3 Camp. 461; 7 Pr. 544. And, where the declaration stated that plt. was treasurer and collector of certain tolls, and that deft. spoke of and concerning the plt., as such treasurer and collector, certain words, "thereby meaning that the plt., as such treasurer and collector,

had been guilty of," &c. it was held, that the plt. was bound by the innuendo to prove that he was treasurer and collector: *Sellers v. Tyll*, 4 B. & C. 655.

If there be any doubt, either as to the precise terms of the libel or words, or as to the evidence of the deft.'s intention in the different parts of it, it is advisable to insert different counts, varying the statement of the libel and innuendoes according to the supposed facts, and the evidence which it is expected may be adduced in support of them: 2 Chit. Pl. 625.

*Statement of Damage.*] Where the words are actionable, it is not necessary to lay special damage, in order to support the action: *Lowe v. Harewood*, Sir W. Jones, 196. But, if the plt. has sustained any special damage, he should state it, it being a rule, that no evidence shall be received of any loss or injury which the plt. has sustained by the speaking of the words, unless it be specially stated in the declaration. In *Browning v. Newman*, 1 Str. 666. *Ld. Raymond*, took a distinction between the case where the special damage is the gist of the action, and where the words are in themselves actionable, that, in the former, evidence of special damage is allowed, though the particular instances of such damages are not specified in the declaration; but, in the latter case, particular evidence of special damage shall not be given in evidence, unless particularized in the declaration. There the plt. declared, that, by reason of these words, one J. M., and divers other persons, who were his customers, left off dealing with him. However modern practice does not warrant this distinction; for it seems now fully established, that, in each case, the special damage must be alike particularly specified in the declaration. Therefore, in an action by a victualler, for calling his wife a whore, whereby several customers left his house, without naming any, this is not laying a special damage: B. N. P. 7. Where the slander is alleged to have been the loss of marriage, the individual must be named, or no evidence can be given of it, 1 Sid. 396; but, where the declaration, in an action of slander, imputing incontinence to the plt., stated that he was a preacher to a dissenting congregation, in a certain chapel, and derived considerable profit from preaching, and, by reason of the slander "the \*said persons frequenting the chapel, had refused to permit him [\*801] to preach there, and had discontinued giving the profits, which they usually had, and otherwise would have given," it was held sufficient, without saying who those persons were: *Hartley v. Herring*, 8 T. R. 130. So, in an action of slander of title, whereby the plt. lost the sale of his lands, it was held too general, and therefore bad: *Lowe v. Harewood*, Sir W. Jones, 196.

The special damage must be the legal and natural consequence of the words spoken; otherwise it does not sustain the declaration, see *post*. If a third person is guilty of an illegal and tortious act to the plt., in consequence of the words, the deft. is not answerable for it, but the plt. must bring his action against such third person: *Vicars v. Wilcox*, 8 East, 1. The loss of substantial benefit, arising from the hospitality of friends, is sufficient special damage: *Moore v. Meagher*, 1 Taunt 39.

In the case of a servant, where he assigned as a reason that a person refused to employ him, partly on account of the libel, and partly because he had been discharged from his former place, he was nonsuited: 8 East, 1.

And, where deft. libelled a performer at a theatre, in consequence of which she refused to sing, and the plt. alleged that his oratories were thereby less numerously attended, it was held that the injury was too remote to support an action: 1 Esp. Rep. 48; and see, further, *ante*, 344, 401.

**PLEA.**—*General Issue, and Pleas of Justification, when Proper.*] The general issue, not guilty, puts the plt. upon proof of all the material facts stated in the declaration, viz. the material inducement, the publication, the colloquium, the slander itself, the innuendoes, and the damage. The deft. may also prove under it any defence that may be availed of in an action on the case: *ante*, 345. He may show accord and satisfaction; and, where the plt. had agreed not to bring the action, in consideration of the deft. destroying certain documents relating to the charge imputed to the plt., which the deft. accordingly destroyed, *Ld. Ellenborough* admitted this in evidence, as accord and satisfaction: *Lane v. Applegate*, 1 Stark. 97. When the deft. admits the publishing or speaking of the libel or words, as stated, but justifies so doing because they are true, he must plead such matter specially, as he cannot give it in evidence upon the general issue.

Where the defence is, that the libel or words were published or spoken not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue, because it proves that the deft. is not guilty of the malicious slander charged in the declaration, *Smith v. Richardson*, Willes, Rep. 20, and note (b.), *R. v. J. Wright*, 8 T. R. 298; as, if the words were spoken by the deft. as counsel, and were pertinent to the matter in question: *Brook v. Sir H. Montague*, Cro. J. 90; *Earl of Shrewsbury v. Stanhope*, Poph. 69; *Flint v. Pike*, 4 B. & C. 481; 6 D. & R. 528; *Hodgson v. Scarlett*, 1 B. & A. 232. So, deft. may show that the libel was contained in a petition to the House of Commons, 1 Saund. 130; or that he made the publication as a member of Parliament, in the course of his duty as such, 1 Bl. C. 164; but this does not extend to a publication out of Parliament, as where a member publishes or revises his speech: 1 Esp. Rep. 226; *R. v. Creevy*, 1 M. & S. 273. Deft. may also show that the libel was contained in articles of the peace exhibited to a justice of the peace, 4 Rep. 14; or in any other proceeding in a regular course of justice, 2 Inst. 228, whether civil or criminal, *ib.*; and even though the court want jurisdiction, 4 Co. 14, and though the process were improper, 1 Vin. Ab. 389; or deft. may show that he acted as a judge, juror, witness, &c.: *Jekyl v. Moore*, 2 N. R. 341; 2 Inst. 228. And no matter which is stated in any memorial or petition

[\*802] against the conduct of any magistrate, public officer, or other person, shall be deemed a libellous publication, if it be done *bona fide* with a view of obtaining redress; and likewise if it be addressed in the proper channel by which such redress may be had: thus, where the deft. being deputy-governor of Greenwich Hospital, printed an account of the abuses of the hospital, and treated, with asperity the characters of many of the officers of the hospital (especially Lord Sandwich, who was first lord of the admiralty,) but distributed the copies to the governors of the hospital only, it was held that the distribution of the copies merely to the persons whose situations imposed on them the duty of redressing the

grievances, and who had the power to do so, negatived the presumption of malice: *R. v. Baillie*, M. T. 30 G. 3, cited *Holt*, C. 312; *Oliver v. Bentinck*, 3 Taunt. 466; *Holt*, *Libel*, 172. The memorial of a tradesman, addressed to the secretary at war, complaining of the conduct of a half-pay officer in the army, for not having paid a debt due to him, and stating the facts of his case fairly and honestly, according to his opinion and understanding of such facts, is not the subject of an action for a malicious libel, although the statement of those facts is derogatory to the character of the officer: *Fairman v. Ives*, 1 D. & R. 252, s. c.; 5 B. & A. 642. But, where it appears that the mode or extent of the publication is unwarranted by the usual course of proceeding, or by the necessity of the case, the deft. will be without defence: 2 Stark. 297; 1 Lev. 241; 2 Stark. Ev. 875.

Deft. may also show that the alleged libel consists in a faithful report of a trial in a court of law, though it is more usual to plead it specially: *Curry v. Walter*, 1 B. & P. 525; 3 B. & A. 702; *Flint v. Pike*, 4 ib. 473. But the publication of *ex parte* proceedings before magistrates, affecting the plt.'s character, is not justifiable, *Duncan v. Thwaites*, 3 B. & C. 583; 5 D. & R. 447; or before a coroner or other officer: 5 Esp. Rep. 123; 2 Camp. 563. It is libellous to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plt. had committed perjury: *Styles v. Nokes*, 7 East, 493, s. c.; *nom. Carr v. Jones*, 3 Smith, 491, 503. [Where the libel declared on was contained in an advertisement, stating the issuing of process against the plaintiff, and that he could not be found, and offering a reward for such information as should lead to his being taken; plea, that a capias had been issued and delivered to the sheriff, and that the plaintiff kept out of the way, and that the advertisement had been inserted at the request of the party suing out the writ to enable the sheriff to arrest; held a sufficient defence: *Lay v. Lawson*, 4 Ad. & Ell. 795.]

Deft. may also show that the libel was a fair use of his judgment in the criticism of works of art or literature, and, where the author introduces himself into the work, it is not libellous to throw ridicule on him, in as far as he has embodied himself with his work; and that, if he be not followed into domestic life, for the purposes of domestic slander, he cannot maintain an action for any damage he may suffer, in consequence of being thus rendered ridiculous, and that one writer, in exposing the follies of another, may make use of ridicule, however poignant: *Sir J. Car v. Hood*, 1 Camp. 355. And, in an action for a libel upon the plt., in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the deft. may show that the supposed libel is a fair stricture on the general run of the plt.'s publications: *Tabart v. Tipper*, 1 Camp. 350. And the editor of a paper may fairly comment on or criticise the performance of theatrical or other public performances, *Dibdin v. Swan*, 1 Esp. Rep. 28; or on matters of public interest, whether before parliament or other public bodies: *Dunne v. Anderson*, R. & M. 287; 3 Bing. 88. Deft. may show that plt. pursues an illegal avocation, as that he keeps a public room for pugilistic exhibitions, and that the libel was respecting his conduct in such avocation: *Hunt v. Bell*, 7 Moo. 212; 1 Bing. 1. [Writing of the plaintiff, a floricultural exhibitor, "the name of G. is to be rendered famous in all sorts of dirty work," is not

within the privilege of fair criticism: *Green v. Chapman*, 4 Bing. N. S. 92; and 3 Scott, 340.]

Def. may also show that the communications were made in confidence, notwithstanding they may be false and erroneous, and prove injurious to the party. This rule applies equally to words written and spoken, as the law protects the communications of business, and the necessary confidence of man to man. If the communications be malicious, however, [\*803] as well as false, and, under the cloak of confidence, be meant \*to defame, they will afford deft. no defence. The law not only extends this exemption to the confidential communications of friendship, but to all such charges as necessarily exclude the suspicion of malice: *Weatherston v. Hawkins*, 1 T. R. 110; *Dunman v. Biggs*, 1 Camp. 269; *Rex v. Hart*, 2 Burn's Ec. Law, 779; *Ward v. Smith*, 4 C. & P. 302, ante, 801; post, 808. When a master honestly and fairly gives the character of a servant, to one who asks his character on the pretence of meaning to hire him, he may give that matter in evidence under the general issue, *Edmonson v. Stephenson*, B. N. P. 8, *Weatherston v. Hawkins*, 1 T. R. 110; but, if done maliciously, and with an intent to injure the servant, it is otherwise: *Rogers v. Clifton*, 3 B. & P. 587. So, if the words were innocently read, as a story out of a history, Cro. J. 91, or were spoken through concern, *Crawford v. Middleton*, 1 Lev. 82, or in a sense not defamatory, *Lord Cromwell's case*, 4 Rep. 12, b., s. c. cited Rep. 69, the same may be given in evidence under the general issue.

Def. may also show that the libel was the subject of amicable or Christian reproof, or that it was mere matter of caution to a friend, 4 B. & C. 247, Holt, C. 306, or that deft. spoke the words not maliciously, but out of concern for the plt., 1 Lev. 182, or that it was done *bona fide* by a person really interested for the purpose of obtaining necessary information on the subject. Thus, an advertisement in a newspaper has been held not to be libellous, which was published by the deft. at the instigation of the plt.'s wife, for the purpose of ascertaining whether the plt., at the time he married her, had another wife living: *Delany v. Jones*, 4 Esp. Rep. 191, [Where the defendant, a son-in-law, addressed a letter to his mother-in-law, about to marry the plaintiff, containing slanderous imputations against him; held, that the occasion justified the writing, and that the jury were to say whether the defendant acted *bona fide*, and under a belief of the truth, although the imputations were false; and that such imputations were to be regarded liberally, unless a clearly malicious intention were manifest in the act: *Todd v. Hawkins*, 8 Car. & P. 88; and 2 M. & Rob. 20.]

As to what deft. may show in mitigation of damages under this plea, see post, 812.

*Form of Plea of Justification.*] The law does not allow of a plea of justification, containing *general* charges of fraud or felony committed by the plt., because they do not apprise the plt. of the defence which is intended to be set up, and such pleas ought to be demurred to: 11 Price, 235. As where in an action for a libel, for printing of the plt. that he was a swindler, the deft. pleaded that the plt. had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions,

wherefore he printed, &c., and to this there was a special demurrer: the Court of K. B. was of opinion that the plea was bad, as, being too general, the deft. ought to have alleged *some particular crime*, with the time, place, and the persons with whom the plt. was supposed to be connected, and that, when the deft. took upon himself to justify generally the specific charge of swindling, he must be prepared with the facts which constitute the charge, in order to maintain his plea. And he ought to state those facts specifically, to give the plt. an opportunity of denying them, for the plt. cannot come to the trial prepared to justify his whole life. The deft. could not prove the justification, as he has pleaded it by general evidence; but he has no justification, unless he can prove the special instances, and, knowing them, he ought to put them on the record, that the plt. may be prepared to answer them; and they reversed the judgment of the C. P., which had held the plea good: *P. Anson v. Stuart*, 1 T. R. 748. So, a justification, repeating general charges against an attorney of gross fraud, &c., was held bad on demurrer: *Holmes v. Catesby*, 1 Taunt. 549. A plea, justifying the publication of the reasons of the plt.'s dismissal from the service of the East India Company, on the ground that the deft. was ordered, as governor in council, to dismiss the plt., for the reasons alleged, was held insufficient, because it did not show that the mode of publication was such as it was the duty of \*the deft., as [\*804] governor in council, to adopt: *Oliver v. Lord William Bentinck*, 3 Taunt. 456.

But a plea, justifying generally the truth of the slander, will suffice, if the slander, stated in the declaration, show a specific charge: *semb.* see 1 Bing. 403; 2 B. & C. 678; 4 D. & R. 230, *s. c.* But a plea, merely stating that the words are true in substance, would, it seems, be bad: 4 B. & C. 473; 6 D. & R. 528.

The plea of justification must confess the speaking of the words alleged; otherwise it is bad: as, if the declaration be, "thou has played the thief with me, and hast stolen my cloth and half a yard of velvet," the justification was, that the plt. was his tailor, and upon the day of, &c. he delivered to him a yard and a half of velvet, to make him a pair of hose, which he made too little, by reason whereof he spoke these words, "thou hast stolen part of the velvet which I delivered you," without this, that he spoke any words, on any other occasion, or in any other manner, this justification is not good, for it does not confess any words, though it traverses the words alleged: *Johns v. Gittings*, Cro. El. 239. So, it is holden to be no justification to an action of slander, to say that such an one told the slander to deft.; but, if the person repeating the slander, at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former: *Earl of Northampton's case*, 12 Rep. 130; *Davis v. Lewis* 7 T. R. 17. And the reason seems to be, because the deft. gives to the party injured a certain cause of action against the original speaker; therefore, it is not sufficient, in a justification of slander, that the deft. named the original author of it at the time, to allege that the original slanderer used such and such words, *or to that effect*, although in the libel declared on, the deft. state that another had spoken the same slanderous words of the plt., *or words to that effect*; but the deft. must give the very words used, though it be only necessary to prove some material part of them: *Maitland v. Goldney*, 2 East, 426. In that case another objection was taken, upon which the

court gave no opinion: viz., that in no case can the deft. justify publishing, in *writing*, the oral slander of a third person, although, in the same writing, he mentions the author of the slander. However this may be, wherever the words originally spoken are actionable in themselves as slander, it seems clear that, where their actionable quality arises from the circumstance of their being in writing, such a justification cannot be good, because it does not disclose a cause of action against the third person. It has been held not to be a good justification that there was reason to think the imputation true, from what had been said, without stating *what* had been said, and by *whom*: *Lane v. Howman*, 1 Price, 76. So, where the declaration was for saying "you are a thief, and stole £20 from me," it is no justification that the plt. stole a *hen* from the deft.: *Hilsden v. Mercer*, Cro. J. 677. But the deft. may plead not guilty as to part of the words alleged, and justify speaking of the rest, or, which is now the usual course, the deft. may plead not guilty to the whole declaration, and plead a plea of justification to part of the words alleged, either in the declaration, or in any count of it: 1 Saund. 244. n. [Where the plaintiff's ship being advertised for passengers, the defendant published she was unseaworthy, and had been bought by Jews to take out convicts; held, that a plea to the whole declaration, that the ship was unseaworthy, was insufficient, as the remaining allegation,—bought to take out convicts—was calculated to deter passengers from applying: *Ingram v. Lawson*, 5 Bing. N. S. 66; 7 Dowl. 125; 6 Scott, 775.]

REPLICATION, &c.] The general replication *de injuria*, will suffice, for, according to 8 Rep. 67, *a.*, *Jones v. Kitchen*, 1 B. & P. 76, the general replication, *de injuria sua propria absque tali causa*, is proper, when the deft.'s plea does consist merely of matter of *excuse*, and of no matter of *interest* whatsoever: 1 Saund. 224, n. If the declaration does not state the particular persons of whom the libel was published, and the deft. has pleaded that he published it lawfully, as to members of a committee of the House of Commons, and the plt. proceed for a publication to other persons, not members of the "committee, he should reply, or rather now assign, such illegal publication: 1 Saund. 193; 2 Camp. 175.

### Precedents.

#### DECLARATION FOR A LIBEL, DIRECTLY ACCUSING PLT. OF THEFT.

(*Venue transitory. Commencement as ante*, 545.) For that whereas the said plt. now is a good, true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said deft. as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (*venue*.) And whereas, also, the said plt. hath not ever been guilty, or, until the time, of committing of the said several grievances by the said deft., as hereinafter mentioned, been suspected to have been guilty, of theft, or any other such crime, (or, "of the offences and misconduct hereafter mentioned to have been imputed to the said plt.") by means of which said premises, he, the said plt., before the committing of the said several grievances by the said deft., as hereinafter mentioned, and deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c., aforesaid. And whereas, also (*here*



*state any inducement that may be necessary to explain the libel, see ante, 794.)* to wit, at, &c., aforesaid. Yet the said deft., well knowing the premises, but greatly envying the happy state and condition of the said plt., and contriving and wickedly and maliciously intending to injure the said plt. in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that he, the said plt., had been and was guilty of theft (or, "of the offences and misconduct hereafter stated to have been imputed to his charge,") and to subject him to the pains and penalties by the laws of this kingdom made and provided against, and inflicted upon, persons guilty thereof, and to vex, oppress, injure, and wholly ruin him, the said plt., heretofore, to wit, on, &c. (*day of publication or about it,*) at, &c. (*venue.*) aforesaid,\* falsely, wickedly and maliciously did compose and publish, and cause and procure to be published, of and concerning the said plt. ("and of and concerning the matters aforesaid," *if there be any special inducement to explain the words.*) a certain false, scandalous, malicious, and defamatory libel, containing amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plt. (and of and concerning the matters aforesaid,) (that is to say) he (meaning the said plt.) is a thief; thereby then and there meaning that he, the said plt., had been and was guilty of theft and larceny.

## SECOND COUNT.

And the said plt. further saith, that the said deft., further contriving and intending, as aforesaid, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue.*) aforesaid, falsely, wickedly, and maliciously did compose and publish a certain other false, scandalous, malicious, and defamatory, libel, of and concerning the said plt. ("and of and concerning the matters aforesaid," *if the libel is explained by an inducement.*) containing, amongst other things, the false, scandalous, defamatory, and libellous matter following, of and concerning the said plt. (and of and concerning the matters aforesaid,) that is to say (*here vary the words and innuendos from the other counts, as the circumstances of the case may require. And another count (omitting that which relates to the composing the libel, and conclude with a statement of damages, which may be thus:)* By means of the committing of which said several grievances by the said deft., as aforesaid, he, the said plt., hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and \*worthy subjects of this realm, inasmuch that divers [\*806] of those neighbours and subjects, to whom the innocence and integrity of the said plt. in the premises were unknown, have, on occasion of the committing of the said grievances by the said deft., as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the said plt. to have been and to be a person guilty of theft (or, "of the said offences and misconduct before stated to his charge,") and have by reason of the committing of the said grievances by the said deft., as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with him, the same plt., as they were before used and accustomed to have, and otherwise would have had. And, also, by reason thereof, (*here state the special damages, if any;*) and the said plt. hath been and is, by means of the premises, otherwise greatly injured, to wit, at, &c., aforesaid, to the damage, &c. \*

## IN DECLARATION FOR VERBAL SLANDER, ACCUSING PLOT. OF THEFT.

(*Proceed as in the precedent, ante, 805, to the,\* and then as follows:*) In a certain discourse which he, the said deft., then and there had of and concerning him, the said plt., in the presence and hearing of divers good and worthy subjects of our lord the now king, then and there, in the presence and hearing of the said last mentioned subjects, falsely and maliciously spoke and published to and of, and concerning, the said plt., (*and, if the words be actionable only with reference to the inducement of some extrinsic matter, say,* "of and concerning the matters aforesaid,") these false, scandalous, malicious, and defamatory words following, that is to say: "you (meaning the said plt.) are a thief."

## SECOND COUNT.

And, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue.*) aforesaid, in a certain other discourse which the said deft. then and there had, in the presence and hear-

ing of divers other good and worthy subjects of this realm, he, the said deft., further contriving and intending, as aforesaid, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plt. (and of and concerning the matters aforesaid,) these other false, scandalous, malicious, and defamatory words following, that is to say, &c. (*Here state the words, varying them from first count; add other counts, varying the words as the case may require.*) By means, &c. (*Here state the damages, as supra.*)

See other precedents of declarations for libel, that plt. was forewarned on a trial, 2 Chit. Pl. 620; second count, *ib.* 625; for libel being a direct charge of perjury, *ib.*; for libel imputing hypocrisy, *ib.*, 627; for libel on attorney, in conducting a commission of bankruptcy, *ib.*, 629; for libel against master by servant, in giving a false character, *ib.*, 630; for libel, imputing perjury, in answer in Exchequer, *ib.*, 632; for verbal charge of perjury, *ib.*, 634; for verbal charge of perjury, on execution of an inquiry, *ib.*, 639; for accusing governess of fornication, *ib.*, 640; special damage of loss of acquaintances, *ib.*; for accusing justice of pocketing fines of persons convicted, *ib.*, 641; for slander in trade, *ib.*, 705; for slandering title, *ib.*, 707, 709.

Plea of general issue, *ante*, 345.

#### PLEA, JUSTIFYING OF WORDS OF INSOLVENCY THAT PLT. WAS INSOLVENT.

(*Actio non, as ante*, 725.) Because he says that the said plt., at the said several times, when, &c., in the said — counts mentioned, at, &c., aforesaid, was in bad and indigent circumstances, and incapable of paying his just debts, to wit, a certain just debt, amounting to a large sum of money, to wit, the sum of £—, which he then and there owed to one E. F., for, &c. (*here state the subject-matter of the debt*), and a certain other just debt, amounting to another large sum of money, to wit, the sum of £—, which he, the said plt., then and there owed to one G. H., for, &c. (*enumerating as many debts as can be proved to have been long in arrear;*) and which said several debts the said plt. was then and there unable to pay. And this, &c. (*Conclude with a verification, as ante*, 725.)

[\*807] \*See other precedents of pleas of justification, that plt. was guilty of theft, 2 Chit. Pl. 1031; that plt. was guilty of perjury, *ib.*, 1033-7; that deft. was merely a repeater of the slander, *ib.*, 1035; that deft. instituted proceedings by way of complaint, *ib.*; that letter was sent to commanding officer, that plt. might be brought to a court-martial, *ib.*, 1037; for saying that plt.'s horse was not sound, that it was not, *ib.*, 1040; replication *de injuria*, *ib.*, 1186.

#### REPLICATION TO PLEAS JUSTIFYING WORDS, DE INJURIA.

And as the said pleas of the said deft., by him secondly and thirdly above pleaded, the said plt. saith that he, by reason of any thing by the said deft. in those pleas above alleged, ought not to be barred from having and maintaining his aforesaid action against the said deft., in respect of the grievances in the introductory part of those pleas mentioned. Because he saith that the said deft., at the said time, when, &c., in the said first and second counts mentioned, of his own wrong, and without the cause by him, the said deft., in his second and third pleas, or either of them, mentioned, did commit the said grievances in the introductory part of those pleas mentioned, in manner and form as the said plt. hath above thereof complained against him, the said deft., to wit, at, &c., aforesaid. And this he, the said plt., prays may be inquired of by the country, &c.

#### *Evidence for Plaintiff.*

The evidence for plt. under the general issue will consist in proving all the facts put in issue by such plea, as to which, see *ante*, 801. In some cases the libel or words themselves will prove all that is positively stated therein: 11 Price, 235; *post*, 812.

*Proof of Inducement.*] The inducement and other averments of facts, which are materially connected with, and constituting, in effect, a part of

the words of libel, must be proved as stated. A variance between the allegation and the proof will not defeat a party, unless it be in respect of matter, which, if pleaded, would be material; and it is not material, unless the matter, with respect to which the variance is alleged to exist with reference to the libel itself, is essential to support the action, 3 B. & C. 122, 4 D. & R. 670, and see, *ante*, 794, 796, 800; as to what a variance, and how far it is necessary to prove the whole inducement, as laid. It will not be allowed to the plt. to give general evidence of his good character under the usual general inducement of good character, either where the general issue is only pleaded, or where there are pleas of justification on the record: R. & M. 305; 2 Stark. 93; 11 Price, 235; *ante*, 794.

Where a libel has been published concerning the plt. in a particular character, and is only actionable as having been published of him in that character, such character must be proved; as to the degree of proof necessary in the case of physicians, justices, &c., *ante*, 357. In the case of an attorney, an examined copy of the roll of attorneys, signed by the plt. himself, is sufficient; and the book from the master's office, containing the names of all attorneys, and produced by the officer in whose custody it is kept, is sufficient evidence, in conjunction with proof that the plt. practised as an attorney at the time the libel was published: *Rex v. Crossby*, 2 Esp. Rep. 526; 3 B. & C. 138; 4 D. & R. 670; *Jones v. Stevens*, 11 Price, 251. In an action by an innkeeper for words spoken of him in his trade, proof that upon one occasion he sold spirits to be drank out of his house, is sufficient: *Whittington v. Gladwin*, 2 C. & P. 146.

But, where the libel itself admits the character of the plt., it is sufficiently proved. Thus, where the deft. having published imputations against the plt., as envoy of the state of Chili, and the plt., in a declaration \*for libel, stated, as matter of inducement, that he was en- [\*808] voy of that state, it was held, upon motion for a new trial, that the admission of these two facts upon the face of the alleged libel was sufficient proof of them to enable the plt. to sustain his action: *Yrisarri v. Clement*, 3 Bing. 432. Where the plt. declares that he had been a woolstapler at Cirencester, and was a brewer at Oxford, and that deft. spoke of him as such trader in these words,—Mr. H. (the plt.) and B. have both been bankrupts, Mr. H. at Cirencester, and gave no evidence of his having been a woolstapler, but only that he was a brewer at Oxford, and proved the words spoken to have been these,—he was a bankrupt at Cirencester, &c., it was held, that this proof sustained the allegation, that the words were spoken of him in his trade of a brewer, for a trader at Oxford may be a bankrupt at Cirencester: *Hall v. Smith*, 1 M. & S. 287.

*Proof of Malice.*] Malice is the gist of the action for slander: but there are two sorts of malice; malice in fact, and malice in law: the former denoting an act done from ill-will towards an individual, the latter a wrongful act intentionally done, without just cause or excuse; and that, in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but, in actions for slander, *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved: *Bromage v. Prosser*, 4 B. & C. 247; 6 D. & R. 296. In such cases, therefore, it is unnecessary for

the plt. to prove malice; but, in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plt.; and, in *Edmonson v. Stevenson*, B. N. P. 8, *Ld. Mansfield* takes the distinction between these and ordinary actions of slander. In *Weatherstone v. Hawkins*, 1 T. R. 110, where a master, who has given a servant a character, which prevented him from being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him, proof of malice was requisite. And in *Pusly v. Freeman*, 3 T. R. 61, *Buller, J.*, says, that, for words spoken confidentially upon advice asked, no action lies, unless *express* malice can be proved: see, also, 3 Burr. 2425, and 4 C. & P. 302. But, where malice is not essential, it may be, and usually is, given in evidence to increase the damages: 4 B. & C. 257; 6 D. & R. 296. [In an action against the *publisher* of a magazine containing the libel, evidence of personal malice of the *editor* against the plaintiff held inadmissible: *Robertson v. Wyld*, 2 M. & Rob. 101.]

Other libels than those on which the action is brought may be read, to show the *quo animo* of the slanderer; and, in actions for words, plt. has been allowed to give evidence of words subsequently spoken, for the purpose of showing that the original words were spoken maliciously, and to injure: *per Sir J. Mansfield, C. J.*, in *Finnerty v. Tipper*, cited S. N. P. 1042. And, in *Rustel v. Macquistor*, 1 Camp. 49, *n. ib.*, the plt. having proved the words laid in the declaration, offered evidence of other actionable words spoken by the deft. afterwards; and it was held by *Ld. Ellenb.* that evidence might be given of any words, as well as any act, of the deft., to show *quo animo* he spoke the words which were the subject of the action, though it would be the duty of the judge to tell the jury that they must give damages for the words only which were the subject of the action: and the distinction laid down by *Ld. Kenyon*, in *Mead v. Daubigny*, Pea. Rep. 125, that words not actionable in themselves were only admissible, was exploded. Where other words than those laid in the declaration were thus given in evidence, the deft. may prove them to be true, because he had no opportunity of justifying them: *Warne v. Chadwell*, 2 Stark. 457.

*Proof of the Colloquium, and that the Slander was of Plain-  
[\*809] tiff, and the Matters alleged.]* This is essentially requisite: unless the slander was of the plt., the action cannot be supported; and, where the slander itself does not convey the intended meaning, and is connected with some extrinsic matter previously stated, such matter must be proved accordingly: as to what is a variance, and when matter stated is divisible in proof, see *ante*, 796-7. Where the words are only actionable, because they are spoken of a tradesman, &c., as that he is a cheat, bankrupt, &c.; and the declaration avers, as it must do, that the deft. spoke the words of the plt. in the way of his trade, &c., the plt. must, on the trial, prove that the words were spoken in relation to his trade, &c.; otherwise he will be nonsuited: see 2 Saund. 307, *a. n.* (1); and see further, *ante*, 795-6.

*Proof of Publication of written Slander.]* The libel must be produced, and before it is read it must be proved that it was published by

the deft. Proof that the libel is written in the handwriting of the deft, is *prima facie* evidence that he published it, and will throw on him the burden of rebutting such presumption: *Rez v. Beese*, 1 Ld. Raym. 417. And printing a libel is *prima facie* evidence of publishing it: *Baldwin v. Elphinstone*, 2 W. Bl. 1038. And the mere parting with a libel with such an intent, whereby a deft. loses all power of future control over it, is an uttering, without a positive communication of the contents of a paper: *Rez v. Burdett*, 4 B. & A. 135. And a written libel may be published in a letter to a third person; but the publication of a libellous letter to the plt. himself will not support a civil action, though it will an indictment: *Phillips v. Jonson*, 2 Esp. Rep. 624. [The post mark on a letter held to be *prima facie* evidence of a publication, *Shepley v. Todhunter*, 7 Car. & P. 680.] Where, however, the libel is contained in a letter, sent by the deft. to the plt., and it appears that the deft. knew that the letters sent to the plt., were usually opened by his clerk, it will amount to a publication: *Delacroix v. Thevenot*, 2 Stark. 63. But, if a man deliver a paper out of his study by mistake, it is not a publication, though it be a libel: 5 Mod. 167. And the reading a libel in the presence of another without knowing it to be a libel, with or without malice, does not amount to a publication: 4 Bac. Ab. 458. And having a copy of a libel is no publication: Vin. Ab. 12, 224. And a person having a copy of a libellous caricature, showing it to another on being requested so to do, is not thereby liable to an action for maliciously publishing it: *Smith v. Wood*, 3 Camp. 323.

The publication may be directly proved by showing that deft., with his own hand, distributed copies of the libel, or exposed to the public some libellous caricature or representations of the plt., or that he read or sang the contents of the libel in the presence of others: 5 Rep. 125; 9 *ib.* 59, *bi*; 2 Stark. Ev. 848.

When the publication does not take place in this direct method, it must be traced up to the deft., through the medium of other persons' acts. Thus, it may be proved that the libel was bought in the shop of a bookseller, of a person acting in the shop as a servant of the bookseller, which will be *prima facie* evidence of a publication by the bookseller, inasmuch as he has the profits of the sale, and is, therefore, liable for the consequences: *R. v. Almon*, 5 Burr. 2686. To prove a publication of a libel in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the deft. for the purpose of such publication, and that the newspaper produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense; it was held, that what the reporter published might be considered as published by the deft., but that the newspaper could not be read in evidence, without producing the written account delivered by the witness to the editor: *Adams v. Kelly*, R. & M. 157. [Where the libel,—a song,—from which the publication took place, was lost, and the printer produced a similar one printed at the time, which was proved to correspond with that lost, held sufficient: *Johnson v. Hudson*, 7 Ad. & Ell. 223, *n.*] A consent by the master to the act of the servant in printing a libel is *prima facie* evidence of a publication by the master: *R. v. Harris*, 2 St. Tr. 1039. [\*810] The delivering of a newspaper to the officer at the stamp-office is a sufficient publication of a libel in that paper, *R. v. Amphlett*, 4 B. &

C. 35, 6 D. & R. 125, showing that the deft. himself or his servant delivered it. Where it appeared that the libel was written in the handwriting of the deft.'s daughter, (a minor,) who usually wrote his letters of business, but no evidence was given of any authority to write the letter in question, or of any recognition of the letter by him, it was held that there was no evidence of a publication by the deft., since this was not an act within the scope of the deft.'s authority: *R. v. Watson*, 1 Camp. 215; 1 Moo. 477. In an action for publishing a libel against the deft. in a newspaper, a witness was called, who proved that he had purchased one of the papers containing the libel, before the action was brought, and another copy after, which was objected to; it was held by *Ld. Ellenb. C. J.*, that, although it was inadmissible for the purpose of aggravating the damages, yet that it was evidence to show that the paper was circulated deliberately: *Plunkett v. Cobbett*, cited 2 S. N. P. 1042.

The evidence of publication of libels contained in newspapers is greatly assisted by the 38 Geo. 3, c. 78. By that act it is enacted, that no person shall print or publish any newspaper, until an affidavit (or affirmation, in case of a Quaker,) shall have been delivered at the stamp-office, setting forth the real and true names, additions, descriptions, and places of abode, of the printer, publisher, and of *all* the proprietors, if they do not exceed two, exclusively of printer and publisher; if they do, then of two of such proprietors, exclusively of printer and publisher, specifying the amount of shares, the true description of the building wherein such paper is intended to be printed, and the title of such paper. If the proprietors exceed two, then two whose proportional shares in the property, shall not be less than the proportional share of any other proprietor, exclusively of printer and publisher, shall be named and described in the affidavit or affirmation. This affidavit or affirmation must be renewed as often as printer, &c. shall change their abode, or printing office, or as often as commissioners for stamp duties shall require. It must be signed by the parties making it, and taken by a commissioner, or persons specially appointed by commissioners. It must be sworn by all the parties, if they do not exceed four; if they do, then by four, who shall give notice to the other parties not swearing, under a penalty of £50. Such affidavits or affirmations shall be filed, and the same, or certified copies thereof, shall, in all proceedings, civil and criminal, touching any newspaper therein mentioned, be received as conclusive evidence of the truth of the matters contained in such affidavit against the persons swearing, and against proprietors named but not sworn, unless such persons shall have delivered to the commissioners, previously to the date of the newspaper in question, an affidavit or affirmation of their having ceased to be printers, &c. of such paper; and by the 11th section, it is enacted, that after such affidavit shall be produced in evidence against the person signing the same, &c., and after a newspaper shall be produced in evidence, intituled in the same manner as the newspaper mentioned in such affidavit, and wherein the name of the printer and publisher, and place of printing, shall be the same, it shall not be necessary for the plt., informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper to which such trial relates, was purchased at any house, &c. belonging to or occupied by the defts. or their servants, &c. or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold.

The affidavit, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit, is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in the county where the [\*811] printing of it is described to be.

By the 13th section, certified copies of such affidavits, &c., shall be delivered by commissioners, or proper officer, on payment of 1s. A copy of such affidavit, &c. certified to be a true copy, under the hand of commissioners, or proper officer, shall, on the proof of hand-writing only, without proving the person signing to be a commissioner or officer, be proof of the swearing or affirmation, and contents, and that it has been sworn or affirmed according to the statute. Every printer or publisher must, within six days after publication, deliver a copy of his paper, signed by himself or his publisher, with his name and place of abode, to commissioner or other officer, and any person may apply for and shall obtain the same at any time within two years from the day of publication (on giving surety to return it,) for the purpose of producing it in evidence in any proceeding, civil or criminal.

After proving the publication, the libel itself may be read. As to what a variance, *ante*, 797-8. If the libel be in a foreign language, it will be necessary to show that the translation stated in the declaration is correct: *R. v. Peltier*, Selw. N. P. 1041.

*Proof of Publication of Verbal Slander.*] Where the action is for oral slander, evidence of its having been spoken in the presence of a third person is sufficient: B. N. P. 5. The words charged in the declaration shall be proved to have been spoken, though greater latitude is allowed in this respect than in those of written libels; and, provided the sense be kept entire, it seems that even partial grammatical variances in the construction of sentences, will not be material: see *ante*, 798-9, as to what is a variance. Where a witness, having heard scandalous words spoken, has committed them immediately to writing, he may afterwards read the paper in evidence, if he swear that the words contained in it are the very words, *per Holt, C. J., Sandwell v. Sandwell*, Holt, R., 295; and, if the words have not been written immediately, the witness may refer to his minutes to refresh his memory: 2 Stark. Ev. 846.

*Proof of Innuendoes.*] Where the innuendoes are essentially requisite to convey the desired meaning of the words, the same must be established as stated; and sometimes, though they be not essentially requisite, the same must be so established: see *ante*, 799.

[The intent attributed by an innuendo, is not admitted by a general demurrer to the declaration; thus, the words being, that he had corn from B.'s barn, (meaning that he had stolen it from B.,) held, that the words did not warrant the innuendo: *Wheeler v. Haynes*, 1 Perr. & D. 55.]

[*Course of the Evidence.* If libellous matter be two-fold, and the plaintiff's counsel in his opening having stated evidence to disprove them, call witnesses only as to one, he can only contradict the defendant's witnesses as to the other, and cannot give evidence, in reply, in support of his original statements. Per Denman, L. C. J., shortly disproving the practice of counsel stating facts in their opening, and then offering no evidence in support of them: *Duncombe v. Daniell*, 8 Car. & P. 223.]

*Damages.*] The measure of damages in this action is the extent of the injury which the person slandered may have sustained. Where special damage is the gist of the action, plt. will be nonsuited, unless he prove an injury therefrom, B. N. P. 6; but plt. must, in such case, confine himself to the allegations in his declaration, as he will not be allowed to go into evidence of other causes of special damage than those alleged, 1 Saund. 243, d. (n.); see *ante*, 800, as to what evidence of special damage is admissible when not stated in the declaration. The persons particularized in the declaration as having left off dealing with the plt. by reason of the speaking of the words, may be called as witnesses to prove the fact: see Lib. Plac. 45, pl. 66; Lil. Ent. 79, 80; *ib.* 61, 62. In an action for slanderous words, charging a baker with using adulterated flour, if the declaration allege, as special damage, that several persons, naming them, discontinued to take his bread, the person of whom they used to buy it cannot be asked what reason they gave for ceasing to take it any longer; but the persons themselves must be called to prove their motives; *Filk v. Parsons*, 2 C. & P. 201. But where special damage is alleged to be the loss of performances at a theatre, or place of public amusement, a witness may be examined generally as to the diminution in the receipts, [\*812] but he cannot\* be asked whether particular persons have not attended in consequence: *Ashley v. Harrison*, 1 Esp. Rep. 48; and see further, as to what damage plt. may recover, *ante*, 801.

#### *Evidence for Defendant.*

*Under General Issue.*] We have already seen what proof this plea will put the plt. to, as also what matter deft. may prove under it, showing he was not guilty of malice, &c. Deft. should be prepared to rebut the plt.'s proofs: as to accord and satisfaction, *ante*, A. & S.; as to what deft. may show in mitigation of damages, see *infra*.

In an action for a libel, the deft. has a right to have the whole of the publication read from which the passages charged are extracts: *Cooke v. Hughes*, R. & M. 112.

*Under Plea of Justification.*] After the plt. has proved his case under the general issue, the deft. must be prepared to support his plea of justification. The evidence must necessarily depend on the facts stated in the plea. A plea that the words are true in substance and fact, must be strictly proved as to all the material parts of the slander: *Shope v. Dobbs*, 1 Bing. 203; *Colegrave v. Dias Santos*, 2 B. & C. 78; 4 D. & R. 230, s. c. Under a plea of justification, that the deft. was only the repeater of the slander, and that he named the author at the time of the slander, and that he was present and heard the original slander published by the person, the deft. must prove the slander actually published by such third person, and not merely the substance of it: *Maitland v. Gouldney*, 2 East, 426; see *Mills v. Spencer*, Holt, C. N. P. 533; *McGregor v. Thwaites*, 3 B. & C. 24; 4 D. & R. 695; *Lewis v. Walter*, 4 B. & A. 605.

*Proof of, in Mitigation of Damages.*] It was resolved at a meeting of all the judges, by a large majority, that, on not guilty, the truth of the words shall not be allowed to be given in mitigation of damages: *Underwood v. Sparkes*, 2 Str. 1200; Willes, Rep. 20. But the deft. may prove



under the general issue, in mitigation of damages, rumours previously current, *Ld. Leicester v. Walter*, 2 Camp. 251, ——— v. *Moor*, 1 M. & S. 284; but he cannot prove facts to negative the presumption of malice: *Waithman v. Weaver*, 1 D. & R., N. P. C. 10, per *Abbott*, C. J. So, he may prove, that the substance of the libel had been published in a newspaper, without producing the newspaper: *Wyatt v. Gore*, Holt's N. P. C. 299. The reason is, that all these matters show that the plt. had not, at the time of the publication of the slander, a good and unsullied character with respect to the subject matter of the slander, and, consequently, that the damage he has sustained is proportionably small, but the truth of the charges made against the plt. does not show this; for the charges, however true, might have been unknown, and the plt.'s character might have been uninjured, but for the deft.'s publication. If, however, there be a justification on the record, as well as the general issue, the deft. is not at liberty to give such evidence as above in mitigation of damages: *Snowden v. Smith*, 1 M. & S. 286, n., per *Chambre*, J. Nor can the deft. give in evidence, under the general issue, that the slander was communicated to him by a third person: *Mills v. Spencer*, Holt's N. P. C. 534. It was determined in the Court of Exchequer, in a late case, *Jones v. Stevens*, 11 Price, 235, that evidence of the plt.'s general bad character was not admissible in mitigation of damages under the general issue: as the deft. is not permitted, on the general issue, to prove the truth of the charge, so neither is the plt. at liberty to give evidence of its falsehood: *Stuart v. Lovell*, \*2 Stark. 93; see 1 Saund. 244, [\*813] notes by *Patteson and Williams*. The deft. cannot give in evidence that the plt. was in the habit of libelling deft., *Wakly v. Johnson*, R. & M. 422; nor other libels published of him by plt., not distinctly relating to the same subject: *May v. Brown*, 3 B. & C. 113; 4 D. & R. 670; 2 Camp. 77.

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SOLVIT AD ET POST DIEM, see *ante*, 712-13.—SON ASSAULT DEMESNE, *ante*, 95, 100.—SPECIALTY, see "*Deeds*," "*Debt*."—STAKEHOLDER, *ante*, 673; *post*, "*Vendor and Purchaser*."

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### STAMPS.\*

[\* The title of Stamps, occupying sixteen pages of the original work, has been omitted, as wholly inapplicable in the United States. This omission will account for the leap in the paging, from 813 to 829. A similar disposition has been made of the titles, Terrors, and Tithes, *post*, from p. 842 to 853, making an apparent hiatus of eleven pages.]

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### STATUTES, ACTION ON.

[829]

[FORM OF REMEDY.] Debt is the most frequent remedy on statutes, either at the suit of the party grieved or of a common informer: Com. D. *Action on Statute*, E.; Bac. Ab. *Debt*, A. It is frequently given to the party grieved, by the express words of the act, 1 Saund. 34-5, 39, 518, 4 G. 2, c. 28, s. 1, &c., 1 N. R. 174; and, if a statute prohibit the doing an act,

under a penalty of forfeiture, to be paid to a party grieved, and do not prescribe any mode of recovery, it may be recovered in this form of action: 1 Rol. Ab. 598, *pl.* 18, 19; 1 Ld. Raym. 682. And, where an act of parliament casts upon a party an obligation to pay a specific sum of money to particular persons, such persons may sue in debt: 4 B. & C. 962; 7 D. & R. 409. Where a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him generally to sue for the same, debt is sustainable, Com. D. *Action, Debt, E.* 1. 2; and he need not declare *qui tam*, unless where a penalty is given for a contempt, *ib.*, 2 Saund. 374, *n.* 1, 2; but, if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty: 5 East, 5, 313.

Some statutes expressly give a remedy by action on the case, Com. D. *Action upon Statute, A. F., and tit. Pleader*, 2 s. 1-2, s. 30; and, whenever a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, though the statute be silent as to the form of the remedy, this action may be supported: 1 Chit. Pl.

10; Co. 75, *b.*; 2 Inst. 486; 2 Salk. 451; 6 Mod. 26; Doug. 665; [\*830] 13 \*Ed. 1, *st.* 2, *c.* 1, 2; 2 Saund. 374-5; 3 East, 400, 457.

And, if a statute give a remedy in the affirmative, without a negative express or implied, for a matter which was actionable by the common law, the party may sue at common law, as well as upon the statute: Com. D. *Action upon Statute, C.* It has been held, that where a navigation act empowered the company to sue for calls, &c. by action of debt or on the case, an action on the case in tort might be supported, though the debt. were thereby deprived of making a set-off: 7 T. R. 36.

No action can be supported by a common informer, unless he be expressly authorized to sue: 5 East, 313. Debt on a penal statute will not lie against several for what in law is a separate offence in each, as against two proctors for not obtaining and entering their certificates, 1 N. R. 245, 2 East, 574, or against several for bribery: *Griffith v. Stratton and others, judgment in error in the House of Lords from the Exchequer in Ireland, 17th April, A. D. 1806*: 1 Chit. Pl. 74. An action cannot be maintained against an executor for a penalty forfeited by his testator under a penal statute, B. N. P. 15; *sed vide* Sir T. R. 57, 72; Vin. Ab. *Executors, H. a. pl.* 21, 27; 1 Chit. Pl. 78. If the action be against several, for an offence which may be committed jointly, the plt. will succeed, if he prove either of the debts. to be liable: Carth. 361; 2 East, 569; 1 N. R. 245.

FORM OF PLEADINGS.] The *venue*, we have seen, is *local*, if the action be by a common informer: though not so, if by the party aggrieved, *ante*, 413; and as to how to describe the *venue*, *ante*, 414. The commencement of the declaration in debt on a statute at the suit of a party grieved, or by an informer, where the whole of the penalty is given to him, is the same as in debt on a contract; but, where a part of the penalty is given to the informer and the king, or the poor of the parish, &c. the commencement and other parts of the declaration usually state that the plt. sues *qui tam*, &c., though this is not necessary, unless there has been a contempt of the king: Com. D. *Action on Statute, E.* 1; 7 T. R. 152; 1 Chit. Pl. 322. How to describe a statute, *see ante*, 33. The offence, or act charged to have been committed or omitted by the debt., must appear to have been

within the provision of the statute, and all circumstances necessary to support the action must be alleged, or in effect appear on the face of the declaration; and the conclusion, with *contra formam statuti*, will not aid the omission: 1 Saund. 135, n; 3 Wils. 318, 2 W. Bl. Rep. 848; 5 East, 244. It is usual, though unnecessary, when the particular statute limits the time within which the action should be brought, to aver that the offence was committed within such time: 2 East, 340, 362.

With respect to the statement of the exceptions in an act of Parliament, or other instrument, the following rule is laid down by *Ld. Tenterden*, in the case of *Vavasour v. Ormond*, 6 B. & C. 431:—If an act of Parliament, or a private instrument, contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but, if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception; and, if he were to state it as containing an absolute unconditional stipulation, without noticing the exception, it would be a variance. In a middle case, where the exception is only referred to as “except as hereafter excepted,” such exception must be fully stated: *ib.*; see also 1 Chit. Pl. 206–7; 4 Bing. 183.

The declaration should conclude against the form of the statute or statutes, when the act or omission complained of was offence created only by statute, 2 East, 339, 1 Saund. 134, n. 3, 6 East, 140, 7 *ib.* 516; or the declaration should show, at least, that it is only [\*831] founded on the statute: 2 East, 341. The introduction of the usual words, “whereby and by force of the statute,” will not suffice: 3 B. & C. 186; 5 D. & R. 13; *sed vide* 9 Price, 397. When the action is founded on two statutes, the conclusion should be against the form of the statutes: 2 East, 340; Lutw. 212; 4 Hawk. 71; Com. D. *Action, Statute, H.* A conclusion against the form of the statute would be improper: 2 East, 340. Where, however, a statute refers to a former act, and adopts and continues the provision of it, the declaration should conclude only against the form of the statute, 1 Lutw. 212, 1 Saund. 135, n. 3, 2 *ib.* 377, n. 12, 7 East, 516; and, where the offence is prohibited by several statutes, if only one is the foundation of the action, and the others are explanatory or restrictive, a conclusion against the form of the statute in the singular number would be proper: Yelv. 116; 2 Saund. 377, n. 12. The omission of the words “against the form of the statute,” or “statutes,” when proper to be inserted, is fatal, even after verdict: 2 East, 333; Willes, 599, see 1 Chit. Pl. 324. The usual conclusion, by means of the premises, and by force of the statute in such case made and provided, an action hath accrued, &c., appears unnecessary: 1 Chit. Pl. 324. In an action by a common informer, as he is not entitled to damages, no damages should be inserted: 4 Burr. 2021, 2490.

*Nisi debet* is the proper plea to an action of debt on a statute, though, dead, not guilty will in some cases suffice, 1 T. R. 462; Com. D. Pl. 2, s. 11, 17. It would suffice in an action on the case, upon a statute. Under the general issue, *deft.* may show that he comes within an exemption of the act, or in another act: B. N. P. 225; 2 Rol. Ab. 683; 1 T. R. 320. The Statute of Limitations need not, in this action, be pleaded specially:

2 Saund. 636; 2 East, 386. But a former recovery by a third person must: 1 Str. 701. In general, the pendency of a former action must be pleaded in abatement, *ante*, 17; but in a penal action, at the suit of a common informer, the priority of a pending suit for the same penalty, in the name of a third person, may be pleaded in bar, because the party who first sues is entitled to the penalty: Say. Rep. 216. The plea, when two suits were commenced in the same term, should show the precise day or time when the prior suit was commenced: 3 Burr. 1423; 1 Bl. R. 437. To entitle the deft. to a verdict under this plea, the former suit, and declaration therein, must, in effect, be the same as to that which the deft. pleads: see 4 B. & C. 920; 7 D. & R. 409.

See various forms of precedents, *Index*, 3 Chit. Pl. tit. *Statute*. See form of commencement of declaration, *qui tam*, &c., *ante*, 406.

EVIDENCE.] As to the mode of proving the Statute, see *ante*, "*Act of Parliament*." As to proving commencement of action, *ante*, 162; and the locality of the offence, *ante*, 831. The proof of the cause of action must be adduced fully, according to the averments in the declaration: see evidence in debt for not setting out tithes, *post*, "*Tithes*;" for usury, *post*, "*Usury*."

Competency of Witnesses.] The plt. in the action, or informer, who is entitled to any part of the penalty, is an incompetent witness, see 3 Stark. Ev. 776; but sometimes informers are expressly, by statute, made witnesses, and in some other instances informers have been held, to be competent by necessary inference, from particular statutes, on the consideration that such statutes would otherwise be nugatory: 3 Stark. Ev. 1130; 4 East, 182; Say. 289; Willes, 425.

[\*832]

\*STOCK.

As to damages for not replacing, *ante*, 152. When money, *ante*, 672.

### [STOCKBROKER.

In assumpsit by a stockbroker for work and services, in the buying and selling of stock on account of the defendant, the latter pleaded, that the plaintiff at the time was not duly licensed or empowered to act as a broker within the city of London, pursuant to 6 Anne, c. 16, and on demurrer to this plea, it was held good: *Cope v. Rowlands*, 2 Mees. & W. 149.]

### STOCK-JOBGING, DEFENCE OF.

PLEADINGS AS TO.] A defence under this act may be established under the general issue, in assumpsit or debt on simple contract, but it must be pleaded specially in an action founded on a deed: *ante*, 407. The deft. cannot plead non-assumpsit, and the Stock-jobbing Act with it: 1 B. & P. 222; 1 M. & P. 145.

EFFECT OF, &c.] Stock-jobbing is a species of illegality, introduced by 7 G. 2, c. 8, and made perpetual by 10 G. 2, c. 8; and which has the

effect of avoiding any security or contract which is the subject of it. Where a bill has been given for the amount of stock-jobbing differences, it will be void in the hands of an indorsee, with notice: *Steers v. Lashly*, 6 T. R. 61; 1 Esp. Rep. 166. Money borrowed to pay a stock-jobbing transaction, though from a partner in it, is recoverable, and not within the statute: *Faikney v. Reynons*, 1 W. Bl. R. 633. [Time-bargains for stock in foreign funds held neither void as illegal at common law, or within 7 Geo. II. c. 8. *Elsworth v. Cole*, 2 Mees. & W. 31; supporting *Wells v. Porter*, 2 Bing. N. S. 722; and 2 Scott, 194.

So, a wager on the price of foreign stock is not void at common law, or within the 14 Geo. 3, c. 48, which is confined to wagering policies of insurance: *Morgan v. Pebrer*, 3 Bing. N. S. 457; and 4 Scott, 230.]

EVIDENCE AS TO.] Time-bargains at the Stock-Exchange, are where neither buyer nor seller have any stock, but the buyer agrees nominally to buy stock of the seller, at a certain day, viz. £1000: when that day arrives, if the stock is at a lower price than when the bargain was made, the buyer pays the seller as much per cent. on the £1000 as the stock has fallen; but, if the stock has risen, the seller pays the buyer in a similar way: 1 C. & P. 13. Jobbing in omnium is within the 7 G. 2, *Brown v. Turner*, 7 T. R. 630, 2 Esp. Rep. 631, 1 Stark. 496; but dealing in Colombian bonds is not within the statute, as the words, "public or joint stock," mentioned in that statute, relate merely to stock of this country and the object of which was merely to prevent jobbing in the British funds, *Henderson v. Bise*, 3 Stark. 158; nor is dealing in lottery produces within that statute: 4 Camp. 42. And, though by the statute it is requisite that persons selling stock shall be actually possessed thereof at the time of the contract, yet it is sufficient if a principal, selling stock through the medium of a broker, be, at the time of sale possessed thereof, although the broker did not, at the time of the bargain, disclose the name of his principal: *Saunders v. Kentish*, 8 T. R. 162.

In an action on a bill of exchange, a stockbroker may refuse to give evidence that the consideration was founded on a stock-jobbing difference on time-bargains for stock: it seems, however, that he cannot refuse to produce his book in which he was bound to enter all purchases and sales made by him, in pursuance of the 7 G. 2, c. 8: *Rawlings v. Hull*, 1 C. & P. 11.

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SUBPŒNA.—See *post*, WITNESS.

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SUGGESTION OF BREACHES.—See *ante*, 320.

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\*SUNDAY.

[\*833]

The statute 29 C. 2, c. 7, s. 1, enacts, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall exercise any work of their ordinary callings on a Sunday (works of necessity and charity excepted,) under a penalty of £5. An action, therefore, cannot be supported on a contract entered into by the plt. on a Sunday in the way of his ordinary calling, though the contract be made by an agent, and although the

obligation be taken by the party at whose request the contract was entered into, *Smith v. Sparrow*, 4 Bing. 64; though it would seem that the mere inception of such a contract on Sunday would not avoid it, if completed the next day; yet, if the terms are completed on that day, and the mere signature deferred to the next day, it would: *ib.* 12 Moo. 267. [A reintegration of the contract upon a subsequent day should be specially averred:—Thus, in assumpsit for goods sold and delivered, the defendant pleaded a sale on Sunday; to which the plt. replied, the subsequent retainer of the goods by the defendant, whereby he became liable to pay for them on a *quantum valebant*; this replication was held bad, on demurrer, no subsequent promise being alleged after such retainer: *Simpson v. Nicholls*, 6 Dowl. 355; 3 Mees. & W. 240.] It has been held, that the statute does not apply, and the purchaser may avail himself of the contract, if he did not know that the vendor was exercising his ordinary calling on the Sunday, by entering into the contract, although the vendor be on that ground unable to sue thereon, *Bloxsome v. Williams*, 3 B. & C. 292, 5 D. & R. 82, 1 Taunt. 135; though this appears to have been doubted: *Fennel v. Ridler*, 5 B. & C. 406; 8 D. & R. 204. It has been held, that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse, made by him on a Sunday: *ib.* But a sale on a Sunday, which is not made in the exercise of the ordinary calling of the vendor, or his agent, is not void at common law, but it would seem to be so by the statute: *ib.* The parties named in the act are interested there to show what parties the legislature meant, and the words “other person whatever,” must be construed as *ejusdem generis*. The stats. 3 C. 1, c. 1, and 29 C. 2, c. 7, do not make it illegal for stage-coaches to travel on Sunday: *Sandiman v. Breach*, 7 B. & C. 97. [*s. c.* 9 D. & R. 796. A coach proprietor, having refused to carry the plaintiff, because there were no other passengers, he hired a post-chaise to go to his destination: held, that the proprietor was liable for the chaise-hire, notwithstanding the contract was made on a Sunday: *Id. ib.*] And where, in action by an indorsee against an acceptor of a bill of exchange, it appears that the bill was drawn on a Sunday, it was held, that the bill was not void under the statute. 29 Car. 2, c. 7; *Begbie v. Levi*, 1 Crompt. and Jervis, 180: [1 Tyr. 130. As this statute prohibits only the labour, business or work done in the course of a man’s ordinary calling, it does not apply to a contract of hiring; and therefore such a contract for a year, made on a Sunday, between a farmer and a labourer is valid: *Rex v. Witnash*, 7 B. & C. 596; 1 M. & R. 452.]

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SURETY, see *ante*, “Guarantee.”—SURGEON, *ante*, “Apothecary.”—SURPLUSAGE, *ante*, 113, 415.

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### SURREBUTTER AND SURREJOINDER.

A SURREBUTTER is the plt.’s answer in pleading to the deft.’s rebutter, *ante*, “Rebutter:” a surrejoinder is the plt.’s answer in pleading to the deft.’s rejoinder, *ante*, “Rejoinder.” They very seldom occur in practice: when they do, they are governed by the same rules of pleading as those applicable to replications: *ante*, “Replication.”

**SURRENDER**, see *ante*, 383. — **SURVEYS**, *ante*, 748, 558. —  
**TENANTS IN COMMON**, *ante*, 456, 462; *ante*, "Partners." —  
**TENANT**, *ante*, "Lease," and *post*, "Use and Occupation."

## \*TENDER.

[\*884]

**PLEADINGS AS TO**, 834.

**PRECEDENTS**, 835.

**EVIDENCE**, 836. — *Effect of, ib.* — *By whom made*, 837. — *When made, ib.* — *To whom made, ib.* — *How made*, 838. — *Money must be produced and offered, ib.* — *The Tender must be unconditional*, 839. — *The full Debt must be offered*, 840. — *The offer must be in Money, ib.* — *Proof as to prior or subsequent Demand, ib.* — *Proof as to prior issuing of Writ*, 841.

**PLEADINGS AS TO.]** A tender cannot be given in evidence under the general issue in any action: 1 Saund. 33, n. 2. It must be pleaded specially. It is safest not to plead it, if there be any doubt as to the correctness of it; and, in such case, it is best simply to pay the money into court. A tender can be pleaded only to a money demand, for which debt or *indebitatus assumpsit* would lie, and wherein deft. could pay money into court: see *ante*, 680. *Ld. Holt* is said to have been of opinion, that a tender could not be pleaded to a count upon a *quantum meruit*, *Giles v. Hartis*, 1 Ld. Raym. 255; but the contrary has been since settled on demurrer: *Johnson v. Lancaster*, 1 Str. 576. A tender may be pleaded in an action of covenant for payment of rent: *Johnson v. Clay*, 7 Taunt. 486; 1 B. Moo. 200, s. c.

With respect to the *form* of the plea, it may be entitled of the term it is pleaded, though subsequent to the declaration: 1 Saund. 33, n. 2. A tender may also be pleaded to the whole declaration, though the usual practice was to plead it to a particular count only, if there were more than one in the declaration. But the deft. will not be permitted to plead double: first, *non-assumpsit*, or *non est factum*, to the whole declaration; and, secondly, a plea of tender as to part: *Dowgall v. Bowman*, 3 Wils. 145; *Maclellan v. Howard*, 4 T. R. 194; 5 *ib.* 97; 4 Taunt. 459. The plea should be *non-assumpsit* to the part not tendered, and as to that part a tender. The precise term tendered should be stated, and the averment will be proved, though deft. tendered a larger sum than that stated: 3 Stark. Ev. 1559. The precise day when the tender was made is immaterial. It is necessary to state, that deft. actually offered to pay the money: 2 Wils. 74; 10 East, 101. It is not sufficient to state that the deft. *is and always has been ready to pay*; it must be averred that deft. *was always* ready to pay: 1 Saund. 33, n. 2; 8 East, 168-9. If the declaration and plea show that the deft. was not always ready and willing to pay, such plea would be bad, see *Hume v. Peploe*, 10 East, 168; in which case, it was held, that the acceptor of a bill of exchange, having

dishonoured it when due, cannot plead a subsequent tender of the amount, charges, and interest, before action brought. A plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract: *per* *Ld. Ellenb. C. J., s. c.* Such a plea was, however, pleaded in *Rivers v. Griffiths*, 5 B. & A. 630, and no objection was made to it. But the drawer or indorser of a bill of exchange may plead a tender, made within a reasonable time after notice of dishonour: *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36, *s. c.* The action of *assumpsit* being to recover *damages* against the deft. for the non-performance of his promise, a tender cannot, in this action, be pleaded of the *damages*, for that would be to preclude the plt. from recovering his debt, which cannot be, for the debtor must, nevertheless, pay the debt. Therefore, the form of the plea in that case is to confess the \*damages

[\*835] due, and bring the money into court, and pray judgment of *further damages*, such as interest and the costs of bringing the action; but, in *debt*, as the judgment is to recover *the debt*, and *damages* are merely ancillary, being only for the detention and delay of the debt, the proper form is to plead a tender in bar of the damages; but still the tender is no bar to the action in debt, any more than in *assumpsit*: *Giles v. Hartis*, 2 Salk. 623; 1 Ld. Raym. 254; 12 Mod. 152-3.

To a plea of tender, the replication may either deny the tender generally, or state that a writ was previously issued, or a writ with continuances, 1 Saund. 33, *n.*, 8 T. R. 629, 5 Taunt. 307, 5 B. & A. 452; but, if the plea state the tender was made before the commencement of the suit, instead of exhibiting the bill, then there appears no necessity to reply the writ, and it would be sufficient to produce it in evidence, 5 B. & A. 452; 1 D. & R. 27, *s. c.*: or the plaintiff may reply a prior or subsequent demand of the precise sum tendered, 5 B. & A. 630, 2 Salk. 622; or, admitting the tender, may proceed to trial on the plea of non-assumpsit, when he is prepared to prove that more was due than the sum tendered: 1 Ohit. Pl. 501. A replication that the plaintiff had, before tender, instructed his attorney to sue out a writ, and the attorney had, before tender, applied for such a writ, which was afterwards sued out, is not good: *Briggs v. Calverly*, 8 T. R. 629; *Moffatt v. Parsons*, 5 Taunt. 307; 1 Marsh. 35, *s. c.*

To a replication of a writ issued before the tender, deft. may, in his rejoinder, deny the plt. had any cause of action when he sued out the writ, 1 Wils. 141; or may show the real time of issuing out the writ, when the plt. only states the teste: 2 Burr. 950; 3 B. & C. 328; 7 *ib.* 406; 5 D. & R. 149; 7 *ib.* 729.

### Precedents.

Plea of non assumpsit and tender.

In the K. B. (C. P., or Exchq.)

Trinity Term, 9 Geo. 4.  
(Term when pleaded.)

C. D. } And the said deft., by E. F., his attorney, comes and defends the wrong and  
ata. } injury, when, &c., and as to all the said several supposed promises and under-  
A. B. } takings in the said declaration mentioned, except as to the sum of £—, parcel of  
the said several sums of money, in the said declaration mentioned (or, if the tender be to  
some of the counts only, say, "in the said second, &c. counts mentioned,") says that he  
did not undertake or promise in manner and form as the said plt. hath above thereof com-



plained against him; and of this he puts himself upon the country, &c. And, as to the said sum of £—, parcel of the said several sums of money in the said declaration (or, "said second, &c. counts") mentioned, the said deft. says, that the said plt. ought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of £—; parcel, &c. in this behalf; because he says that, after the making of the said several promises and undertakings in the said declaration (or, "said second, &c. counts") mentioned, as to the said sum of £—, parcel, &c. and before the exhibiting of the bill of the said plt. in this behalf (or, if in C. P. or by original, "and before the commencement of this suit") to wit, on, &c. (*day of tender, or about it,*) at, &c., aforesaid, he, the said deft., was ready and willing, and then and there tendered and offered, to pay to the said plt. the said sum of £—, parcel, &c., to receive which of the said deft. he, the said plt., then and there wholly refused. And the said deft. in fact further saith, that he, the said deft., hath always, from the time of the making of the said several promises and undertakings in the said declaration (or, "said second, &c. counts") mentioned, as to the said sum of £—, parcel, &c. hitherto, at, &c., aforesaid, been ready to pay and still is there ready to pay to the said plt. the said sum of £—, parcel, &c. and he now brings the same here into court, ready to be paid to the said plt., if he will accept the same, and this he, the said deft., is ready to verify; wherefore \*he prays judgment if the said plt. ought to have or maintain his [\*836] aforesaid action against him, to recover any more or greater damages than the said sum of £—, parcel, &c., in this behalf, &c.

See other forms of general issue, tender, and set-off, 3 Chit. Pl. 922; plea of tender in debt, *ib.* 955; in covenant, generally, *ib.*, 1021; tender of rent on the land, *ib.*, 1018; plea in trespass of tender of amends, by officer of customs, &c., *ib.* 1063; the like by a justice of the peace, *ib.*, 1065; plea of involuntary trespass, and tender of amends, *ib.*, 1066.

#### REPLICATION TO A PLEA OF SET-OFF.

(*Similiter to the general issue as ante, 778.*) And, as to the said plea of the said deft., by him above pleaded, as to the said sum of £—, parcel, &c., the said plt. saith, that he, by reason of any thing by the said plt. in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him to recover further damages than the said sum of £—, parcel, &c., in this behalf; because he saith that the said deft. did not tender or offer to pay to him, the said plt., the said sum of £—, parcel, &c., in manner and form as the said deft. hath above in his said last mentioned plea in that behalf alleged; and this he, the said plt., prays may be inquired of the country, &c.

#### REPLICATION THAT PLEA ISSUED A WRIT BEFORE THE TENDER.

(*Precludi non, as ante, 778.*) Because he saith that, after the making of the said promises and undertakings in the said declaration mentioned, as to the said sum of £—, and before the making of the said tender in the said plea mentioned, to wit, on, &c. (*the test of or day of issuing the writ,*) he, the said plt., for the recovery of his damages by him sustained, by reason of the not performing the said several promises and undertakings in the said declaration mentioned, as to the said sum of £—, parcel, &c., sued and prosecuted out of the court of our said lord the king, &c. (*state the issuing of the writ, and which may be as ante, 192.*) And the said plt. further saith, that the said precept (or "writ") was so sued and prosecuted by him, the said plt., against the said deft., as aforesaid, with intent to implead the said deft. upon and for the said several causes of action in the said declaration mentioned, as to the said sum of £—, parcel, &c., and to cause him to appear in the said court here, and, upon his said appearance, to declare against him for the said several causes of action in the said declaration mentioned, as to the said sum of £—, parcel, &c. And the said plt. further saith that, according to his said intent, he, the said plt., afterwards, to wit, in — term, in the — year of the reign of our said lord the king, exhibited his said bill, and declared thereon against the said deft., as aforesaid, to wit, at, &c., aforesaid. And the said plt. further saith, that the said deft. did not, at any time before the suing forth of the said precept (or, "writ," tender or offer to pay to the said plt. the said sum of £—, parcel, &c., and this he, the said plt., is ready to verify; wherefore he prays judgment and his full damages, which he hath sustained by reason of the non-payment of the said sum of £—, parcel, &c., to be adjudged to him, &c.

See form of replication of a writ, issued with continuances, 3 Chit. Pl. 1153; replication of a prior demand, *ib.*, 1154; of a subsequent demand, *ib.*; replication, admitting tender, *ib.*, 1156; replication in trespass, that amends were not sufficient, *ib.*, 1201; replication in replevin, denying tender, *ib.*, 1228; the like of a subsequent demand, *ib.* 1229.

See form of a rejoinder in assumpsit, that, when writ issued, plt. had no cause of action, 3 Chit. Pl. 1221; rejoinder showing the actual time of issuing the writ, *ib.*; rejoinders, denying a prior or subsequent demand, *ib.*, 1223; denying record of writ, *ib.*, 1224.

### Evidence.

A tender has the same effect in the admission of the cause of action as the payment of money into court: *ante*, 680. Therefore it admits the \*contract and facts stated in the declaration, and goes only in bar, 7 Taunt. 487; as where a count averred that, in consideration that the plt. would let to the deft. certain tithes, the deft. agreed to pay £41, and that the plt. did let the said tithes, and did permit the deft. to take them, a tender on all the counts generally precluded the deft. from showing a legal interruption to his taking them, if any such interruption had subsisted: *Cox v. Brain*, 3 Taunt. 95. A promise to pay the debt of another need not be proved to be in writing, when the deft. pleads a tender to the count on such promise: *Middleton v. Brewer*, Pea. Rep. 15. Plt. may be nonsuited, although this plea be pleaded: see *Tidd*, 9 *ed.* 624-5, 868.

**PROOF OF TENDER, as to when made.]** The tender must be made before the action was commenced—that is, before the *issuing* the writ: *Bro. Tender*, pl. 9 B. Ab. *Tender*, (D.) The *teste* of the writ need not be regarded: *Stra.* 638; 1 *Wils.* 39. The tender will be good though made after instructions left with the plt.'s attorney to *issue* the writ, if not actually issued, *Briggs v. Calverly*, 8 T. R. 629, 5 Taunt. 307; or though a writ be afterwards issued on the same day. Where the plt. brings an action of debt for the non-payment of rent, and afterwards discontinues the action, and brings a fresh one in covenant, a tender before the commencement of the latter action will be good: see 1 *Moo.* 200. When a tender has been made in a term prior, in fact, to the commencement of the action, but the declaration is of the same term, as that refers to the first day of the term, the deft. shall not be allowed to prove the tender in evidence, as there should have been a special memorandum of the day, *Rolfe v. Norden*, 5 Esp. Rep. 72, *sed quare*, see *Cowp.* 456, 5 B. & C. 149, 7 D. & R. 729, *s. c.*; showing the plt. has a right to set up the fact against the fictitious relation in order to support his plea. As to showing and replying a subsequent demand, see *ante*, 835; *post*, 840.

It should be observed, that there is always a *breach of contract* by the deft. in not paying the money the day he was bound to do it, and all that a tender after the day can do, is to go in mitigation of damages, which in general can amount to nothing in the case of a mere money demand, and are never given by a jury; in some cases, however, where special damage can be shown to have arisen, the same may be given: see *Sweetland v. Squire*, *Salk.* 622; *Johnson v. Clay*, 7 Taunt. 486; *Wood v. Ridge*, *Fort.* 376. A plea of tender by the acceptor, after the day of payment, of a bill of exchange, and before action brought, is not good, though

deft. aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole money then due, owing or payable to the plt. in respect of the bill, with interest from the time of the default, for the damages sustained by the plt. by reason of the non-performance of the promise: *Hume v. Peplow*, 8 East, 168. How far such tender good when made by the drawer or indorsers, *ante*, 313; and the tender causes the interest on the bill to cease: Chit. B. 421. A tender and refusal of principal and interest due on a bond, after the day mentioned in the condition, and before action brought, cannot be pleaded, *Underhill v. Mathews*, B. N. P. 171; but, where the obligee of a bond receives the whole principal after it is payable, he cannot recover in an action on the bond, as *solvit post diem* is a good plea: *Dixon v. Parkes*, 1 Esp. Rep. 110.

*By whom made.*] The tender must be made by the debtor or some one on his behalf: Cro. El. 48; 1 Rol. Ab. 421. Any party, being an agent of the debtor, may tender the money, and the tender enures to the benefit of the debtor, although the agent was authorized only to tender a less sum: *Read v. Golding*, 2 M. & S. 86. As to tender by a stranger without the privity of the debtor, see 1 Inst. 207; Cro. El. 132. Any person may make a tender in behalf of an idiot: 1 Inst. 206.

*To whom made.*] It may be taken as a general rule, that whenever a \*payment to a party would be good, so would a [\*838] tender to him, *ante*, "Payment;" therefore, a tender of money to an agent or servant authorized to receive payment is a good tender to the creditor himself: *Goodland v. Blewith*, 1 Camp. 477; 1 Esp. Rep. 349. A tender of damages to the plt.'s attorney on record is good: 4 B. & C. 28; 6 D. & R. 132, *s. c.* It has been considered that a tender to an authorized agent is enough, although the principal directed him not to receive it; and, where a creditor tells his clerk, previously authorized to receive money, not to receive a sum if offered him by a certain debtor, for that he had put it into the hands of his attorney, and the clerk, on tender made, refuses to receive money, and assigns the reason, held that this is a good tender to the principal: *Muffat v. Parsons*, 1 Marsh. 55; 5 Taunt. 307, *s. c.* But some authority of the principal for the agent to receive payments must exist: *ante*, 714. An offer of a £10 note to a collector appointed by the solicitor to a commission of bankruptcy, for the payment of £4 14s. 6d., the sum demanded being £11 4s. 6d., is not a good tender in substance, the collector having no discretion on the subject: if he had such discretion, it is doubtful whether the tender would be good even in point of form: *Blow v. Russell*, 1 C. & P. 365. A tender to one of two joint creditors is a tender to both; therefore, if A., B., and C. have a joint demand, and C. has a separate demand on D., and D. offer A. to pay him both the debts, which A. refuses without objecting to the form of the tender, on account of his being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B., and C.: *Douglas v. Partrick*, 3 T. R. 683. A tender to an executor, even before he has proved the will, is good, provided he afterwards prove it: Eq. Cas. Ab. 319; Bac. Ab. *Tender, E.*

*How to be made.*] In order to make a tender effectual, the debtor

must actually *produce* and make an *unconditional offer* to pay the *full amount* of the debt due, and *no more in money*. The creditor may, however, dispense with some of these requisites.

*There must be a Production of Money and Offer to Pay.*] To make a legal tender, the money tendered must be at hand, and actually offered and produced, or the production of it must be dispensed with, by the express declaration or equivalent act of the creditor. The mere refusal to take money does not waive the necessity for showing it, and actually offering it to the creditor, for, though he might refuse it at first, yet the production of the money might tempt him to take it. Therefore, when the deft., on departing from home, left £10 with his clerk for the plt., of which the clerk informed the plt., when he called and demanded a larger sum, and the plt. said he would not receive the £10, nor any thing less than his whole demand, but the clerk did not offer the £10, this was held to be no tender: *Thomas v. Evans*, 10 East, 101. Going with money in hand to make a tender, and demanding whether the creditor has a receipt stamp, and receiving an answer in the negative, without an actual offer of the money, will not support a plea of tender: *Byder v. Townsend*, 7 D. & R. 119. Where the deft. ordered A. to pay the plt. £7 12s., and the clerk of the plt.'s attorney demanded £8, on which A. said that he was only ordered to pay £7 12s., which sum was in the hands of B., and B. put his hand to his pocket with a view of pulling out his pocket-book, to pay £7 12s., but did not do so, by the desire of A., but B. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time: held, that this was not a legal tender, as the money should have been produced to the attorney's clerk: *Kraus v. Arnold*, 7 Moo. 59. To prove a tender, the deft. showed that he and a friend went to the plt.'s attorney, and said that he had come to settle the plt.'s account; that he produced [\*839] a paper containing a statement of the account, \*on which he made the balance £5, which he said he was ready to pay, but produced no money or notes, and that the plt.'s attorney said he could not take that sum, as his client's demand was above £8, it was held an insufficient tender: 4 Esp. Rep. 67; Bac. Ab. *Tender*, B. 1. On the other hand, where, at an interview between plt. and deft., when deft. was willing to pay £10, a third person, present, offered to go up stairs and fetch that sum, but was prevented by plt.'s saying he could not take it, such offer is a good tender; and, although the deft. did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act: *Harding v. Davis*, 2 C. & P. 77; and see *Black v. Smith*, Pea. Rep. 88. In an issue, denying a plea of tender, the deft. proved that he sent the money by his servant to the plt.'s house, and the deft.'s servant swore that she carried it to the plt.'s house, and, having seen a servant there, who informed her that her master was at home, she delivered the money to that servant, to be delivered to her master, that the servant took it, and went into the house, as she supposed to deliver it to the plt., and returned with an answer that he could not receive it, but that she must go to his attorney, *Ld. Kenyon* held this evidence to go to a jury, and from which they might infer a tender was made: Anon. 1 Esp. Rep. 349. Where a person offered a sum of money by way of tender, and stated the precise sum he so offered, which he held in his hand,

it is a sufficient tender, although it was twisted up in bank-notes, and not shown to the party; but, if the amount of the sum had not been mentioned, it seems that it would not have been a good tender: *Alexander v. Brown*, 1 C. & P. 288.

*The Tender must be unconditional.*] A tender must be unconditional, unaccompanied with any terms; therefore, a plea of tender is not supported by evidence that the debt. took a sum of money out of his pocket, and said to the plt., if you will give me a stamped receipt, I will pay you the money, as by the stat. 43 G. 3, c. 126, s. 4, the person from whom the money is due may require the person receiving it to give him a receipt, and pay the amount of the stamp-duty, and if he refuses to do so, he is liable to a penalty: *Laing v. Maender*, 1 C. & P. 257. But if, on a tender being made, the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt: *Cole v. Blake*, Pea. Rep. 179. If a person tender money, but will not pay it unless the person to whom it is tendered will give him a receipt in full of all demands, such a tender is bad: *Griffith v. Hodges*, 1 C. & P. 419; and see *Glasscott v. Day*, 5 Esp. Rep. 48; *Huxham v. Smith*, 2 Camp. 31. An offer to pay a sum of money to be accepted as the whole balance due, where a larger sum is claimed, does not amount to a legal tender: *Strong v. Harvey*, 3 Bing. 304; *Evans v. Judkins*, 4 Camp. 156. If a person put down a sum of money, and the plt. offer to take it in part, and the plt. will not allow him to do so, saying that no more is owing, this is not a good tender: *Peacock v. Dickinson*, 2 C. & P. 51, n. Where debt. tendered seven sovereigns, in payment of a demand of £6. 17s. 6d., and said to the plt., "there take your demand," and at the same time delivered a counter claim upon the plt. of £1. 5s., who said, "you must go to my attorney," held, that this was not sufficient to support a plea of tender to an action brought for £6. 17s. 6d.: *Brady v. Jones*, 2 D. & R. 305; *Holland v. Philips*, 6 Esp. Rep. 40. Plea of tender of half-year's rent, simply, is not supported by evidence of a tender of the half year's rent, and requiring the lessor to get change, and pay back the property tax: *Robinson v. Cooke*, 6 Taunt. 396. Where the maker of a promissory note paid money into the hands of an agent, to retire it, and the agent tendered the money to the holder of the note, on condition of having it delivered up, but the note being mislaid, this condition was not complied with, and the agent afterwards became bankrupt, with the money in his hands, held, that the maker was still responsible\* on the note, but that interest was [\*840] not recoverable after the time of the tender: *Dent v. Dunn*, 3 Camp. 296.

*The full Debt due must be Tendered.*] The full amount of the debt due must be tendered. A tender of part of a debt will be of no avail, a creditor not being bound to accept a part-performance of an entire contract: see 1 Leon. 68. But if a debtor owe several *distinct* debts, and he tender to pay one of them, naming the one on which he makes the tender, such tender will be good as to that debt: Bro. *Tender*, pl. 39; Bac. Ab. *Tender*, B.; Latch's Rep. 70. Where a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea, stating that a certain portion of

the sum was tendered for the debt of one: *Strong v. Harvey*, 3 Bing. 304. But, in general, a tender for more than is due is good for what is due: 5 Esp. Rep. 115; Str. 916; 3 T. R. 683. And, if A. be indebted to several persons in different sums of money, and, when they are all assembled together, tender them one gross sum, sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender: *Black v. Smith*, Pea. Rep. 88, *A*. A tender of a larger sum, requiring change, is not a good tender of a smaller sum: *Robinson v. Cooke*, 6 Taunt. 336. And it is not a good tender of a fractional sum for the debtor to offer the creditor a bank-note to a larger amount, and to desire him to take out of that the sum to be paid: *Betterbee v. Davis*, Camp. 70. A tender, however, of a bank-note in payment of a fractional sum, is good, if the creditor object to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, although the creditor is required to return the difference between the bank-note and the fractional sum: *Saunders v. Graham*, 1 Gow, 111. So a tender of £2 to pay £1 13s. is good, if the plt. object to receive it only because he is entitled to receive a larger sum, and not on the ground that he has no change: *Cadman v. Labbock*, 5 D. & R. 289.

*The Tender must be of Money.*] Some money must be proved to be produced: *Dickinson v. Shee*, 4 Esp. Rep. 68. The money shall be current coin of the realm, or foreign money legally made current by proclamation: Bac. Ab. *Tender*, B. 2; 5 Co. Rep. 114. See the statute 56 G. 3, c. 68, s. 11, by which gold coin is declared to be the only legal tender. Bank-notes are not a legal tender, *Grigby v. Oakes*, 1 B. & P. 526; but a tender of a bank of England note is good, if not objected to at the time, *Brown v. Saul*, 4 Esp. Rep. 267, *Wright v. Read*, 4 T. R. 554, see *ante*, 640; and so is a check on a banker: *Wilby v. Warren*, Tidd, 9 ed. 187, *n. m*. A tender of a Bristol bank bill was held, in the Exchequer, not to be a good tender, though no objection was made to it on that account, *Mills v. Sufford*, Pea. Rep. 180, *n.*; but, before and after that case, it was held in K. B. that a similar sort of tender was good: *Lochger v. Jones*, *ib*.

*Proof of, as to prior or subsequent Demand and Refusal.*] If to a plea of tender the plt. replies a subsequent demand and refusal, such a plea admits the tender made, and it becomes incumbent on the plt. to prove that, after the tender admitted in the pleadings, he demanded of the deft. the exact sum specified, as having been before tendered and refused: *Spybey v. Hide*, 1 Camp. 181: 1 Esp. Rep. 115-6: *Rivers v. Griffiths*, 1 D. & R. 215; 5 B. & A. 630, *s. c*. A letter, demanding payment of a debt sent to deft.'s house, and to whom an answer is returned that the demand should be settled, is sufficient evidence to go to a jury, of a demand, on the issue of a subsequent demand and refusal, to a plea of tender: *Haward v. Hague*, 4 Esp. Rep. 93. The subsequent demand of the debt, to do away the effect of the tender, must be by some one authorized to receive it, and to give the debtor a discharge: [\*841] *Coles v. Bell*, 1 Camp. \*478, *n.*, *Coore v. Callaway*, 1 Esp. Rep. 115. A demand by the clerk of the plt.'s attorney is not, in general, sufficient, although a demand by the attorney himself would suffice: 1 Esp. Rep. 115, 116. If the agent refuse to produce his authority, or

show a reasonable ground for the debtor to discover the agency, the demand will be insufficient: see 3 Anst. 363. In replevin, where a tender is pleaded, and a subsequent demand and refusal replied, the demand must be made by, and the refusal be to, the deft.; if so made to one sent or authorized by him, the evidence does not support the issue: *Pim. v. Grevill*, 6 Esp. Rep. 95. After a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication to a plea of tender, that the plt. subsequently demanded payment from the defts.: *Peirse v. Bowles*, 1 Stark. 323. In some cases, a formal demand of the debt must be made before action brought: thus, a formal demand is necessary before an action can be commenced against overseers for the surplus arising from a distress for poor-rates, under the statute 27 G. 2, c. 20, s. 2; and a plea of tender, which is proved to cover the plt.'s demand, will not cure the objection: *Simpson v. Routh*, 4 D. & R. 181; 2 B. & C. 682, s. c.

*Proof as to Writ Issued.*] As to when the plt. may reply, and prove a writ was issued prior to the tender, see *ante*, 835. As to proof of the writ issued, see *ante*, 162, and *post*, "*Writ.*"

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TERRIERS.†

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TESTAMENT AND TESTATOR.—See WILLS.

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THREATS.—See DURESS.

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TITHES, ACTION FOR.†

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TRAVERSE.—See *ante*, 777–8; *post*, 856.

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\*TRESPASS.

[\*853]

WHEN THE PROPER FORM OF REMEDY, 853.

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† [Vide *ante*, p. 813, a note explaining the reason of the present hiatus in the paging.]

EVIDENCE FOR DEFENDANT, 865.

EVIDENCE FOR PLAINTIFF IN TRESPASS TO REAL PROPERTY, 865.—*Under General Issue, ib.—Proof that Property injured was the Subject of an action of Trespass, ib.—Plaintiff's Right thereto, 866.—The injury, and that Deft. committed it, 868.—The Damages, ib.—Under Special Plea, ib.*

EVIDENCE FOR DEFENDANT, 869.

### *When the Proper Form of Remedy.*

TRESPASS *vi et armis* lies to recover damages for immediate wrongs, accompanied with force; to the *person*, by menace, assault, battery, wounding, mayhem, or false imprisonment; to *real* property, as houses, lands, or water-courses; and to *personal* property, by destroying, damaging, taking away, detaining or converting cattle or goods.

To sustain trespass, the injury must be *immediate*, and not consequential. An injury may be considered immediate when the act complained of itself, and not a mere consequence of that act, occasions the injury; as, if a party pour water on another's property, 2 Ld. Raym. 1403; or, throw a log into a highway, and, in the act of throwing, hit another: 1 Str. 633; and see 3 Wils. 403; W. Bl. R. 892; 1 Chit. Pl. 117. On the other hand, where the injury ensues not *immediately* from the act complained of, it is a consequential injury, and trespass will not lie for it; as, if a person place a spout on his building, in consequence whereof the rain afterwards ran thereout, on to plt.'s property, Str. 634, 2 Ld. Raym. 1399; or, if a person throw a log into a highway, and afterwards an injury ensue from the consequence of its being in the way, 3 East, 603, 1 Str. 636: the injuries would in such cases be consequential, and case would be the proper form of remedy for them.

To sustain trespass, the injury must be committed *with force*.

Trespass or case may sometimes be supported where there is both an immediate and consequential injury, and such injury frequently arises in running down ships, driving carriages, &c., in which cases plt. may sue in case for the deft.'s negligence, or in trespass for the forcible wrong. Where the act arises not from the *negligence* of the deft., and is both wilful and immediate, the action must be in trespass: 2 N. R. 117; 8 T. R. 188; 3 East, 601; 3 Camp. 188; 1 B. & C. 145; 2 D. & R. 256; *s. c.*; 4 B. & C. 226. In some cases, by particular acts of Parliament, trespass cannot be supported, though the injury be immediate, and committed with force, as in the case of distresses for rent, &c.: see *ante*, 437. As to when a party may become a trespasser *ab initio, post*, 854.

To sustain trespass, the act must be committed with force, but [\*854] the *degree*\* of force with which the act is done will make no difference: 3 East, 602; 5 T. R. 649.

The *intent* of the wrong-doer is immaterial; as to the question whether the action should be trespass, 3 Wils. 309; 2 W. Bl. R. 832. Though the injury arise from accident, trespass still lies: see 1 Bing. 213; *Underwood v. Hewson*, 1 Str. 596; *Weaver v. Ward*, Hob. 134; 3 East, 593. We have just seen, however, that in some cases trespass is the only



remedy, where the act was wilful: *ante*, 853. As to suing sheriff, &c., in trespass or case, *ante*, 691, 791. If a person, *bona fide*, intending to pursue the authority given by the Building Act, 14 G. 3, c. 7-8, erects a party-wall, without, in fact, pursuing the directions of the statute, and thereby injures his neighbour, he is liable to an action; but the action must be brought after twenty-one days' notice, and within three months after the injury done: *Pratt v. Hillman*, 6 D. & R. 360.

The *legality* or *illegality* of the original act is immaterial, as to the question whether the action should be in trespass, for a party may become a trespasser, even in the performance of a lawful act: 1 Str. 635; 3 East, 601; 3 Wils. 409. As to suing in trespass for an act done under process, *ante*, 515, 651. In some cases, though the act were in the first instance authorized by law, yet a party may, by an unnecessary degree of violence, become a trespasser *ab initio*: Com. D. *Trespass, C. 2*; Bac. Ab. *Trespass, B.*; *Six Carpenters' case*, P. Co. 146. As in the cases of distresses (except for rent or poor's rate, 1 H. Bl. 13, *ante*, 437;) or, where an officer neglects to remove goods attached within a reasonable time, and continues in possession, his entry becomes a trespass *ab initio*, 2 W. Bl. R. 1218; and see *ante*, 437, as to when party becomes a trespasser under a distress for rent. But in the case of an authority, in *fact*, to enter, an abuse of such authority will not, in general, subject the party to this action: Lane, 90; Bac. Ab. *Trespass, B.*

A person may, in some instances, waive a trespass, and sue in assumpsit; as, if money be obtained under duress, plt. may sue for money had and received, 2 Ld. Raym. 1216, 2 W. Bl. R. 827, 2 Str. 915, 3 Wils. 304, 2 T. R. 144, 2 B. & B. 369, 1 B. & C. 418, 2 D. & R. 568; and, in general, where there has been an express contract, the party injured may sustain an action of assumpsit, though the breach amount to a trespass; 2 Wils. 321; 3 Wils. 354; 1 Camp. 360. So, in some cases, though the injury be forcible and immediate, the plt. may waive the trespass, and sue in case for the consequential damage, and, in this respect, trover and trespass are, generally, concurrent remedies for the unlawful taking and conversion of personal property: 1 Salk. 10; 2 Str. 851; 9 East, 298; *ante*, 853; *post*, 869.

To sustain trespass, the *thing injured* must be of substance and tangible, as the body, personal chattels, and real property corporeal; if it be not tangible, such as health, reputation, and real property incorporeal; case is, in general, the only form of remedy. Trespass is the only remedy for trespasses to the person, by menaces, assaults, imprisonments, &c.: *ante*, 94, 575. It lies for injuries to the relative rights of persons occasioned by force, as for criminal conversation, seduction, &c.: *ante*, 395, 783. Trespass lies for taking or injuring all inanimate personal property, and all domiciled or tame animals, as dogs, &c.: 1 Saund. 84, n. 2, 3; 1 Chit. Pl. 152, and cases there cited, and animals usually marketable, as monkeys, parrots, &c.: Cro. J. 262. In some cases, trespass lies for taking animals *feræ naturæ*, and not reclaimed: see 1 Chit. Pl. 152. Trespass lies for an injury to *real property*, where it is tangible and fixed, as a house, land, or land covered with water, in which the plt. has an exclusive interest: 1 Chit. Pl. 159.

We shall consider the nature of the plt.'s interest, to entitle him to maintain this action, as also against whom the action lies in general: *post*, 861, 3.

[\*855]

*Form of Pleadings.\**

**Declaration.]** The *venue* in this action is transitory, if it be for an injury to the person or personal property; but, if it be for an injury to land, it is local, and must be laid where the real property lies: *Doulson v. Matthews*, 4 T. R. 503.

The precise *day or time* on which the trespass was committed need not be stated, though it is usual to state it: 1 Saund. 24. The trespass may be laid with a *continuando* for several days, to prevent the necessity of bringing several actions, 2 Roll. Ab. 545, *pl.* 1; or, as is now more usual, they may be stated to have been committed on such a day, and divers other days and times afterwards, and before the commencement of the suit. The *plt.* may give evidence of trespass committed on all or any of the days stated; and, since the committing of a trespass from day to day is considered in law a several trespass on each day, it must be directly and positively answered by the *def.* as well as the original trespass: *Monkton v. Pashley*, 2 Ld. Raym. 976. The removing of goods wrongfully taken at first from one place to another, is a several trespass at each place, 1 Saund. 24, *n.* 1; there are many acts, however, which, when executed, cannot be done again, but terminate upon the commission of them, and therefore cannot in their nature be continued, as where a man assaults another, or kills another's horse, or cuts down his tree: *ib.*; Cowp. 828. The laying a trespass with a *continuando*, where it ought not to be so, is bad on special demurrer: 1 Ld. Raym. 240; 7 Mod. 152. The *plt.* will not be permitted to give evidence of more than one trespass, if the declaration do not lay it to have been committed with a *continuando*, or on divers days, &c., or contain several counts to meet it: *ib.* If the *plt.* intend to give evidence of repeated acts of trespass, he must confine himself to the time in the declaration, but the *plt.* may waive the time in the declaration, and prove a trespass at any time before action brought, *ib.*; the day, therefore, stated, should be laid back as far as to be anterior to the first act of trespass: *ib.*; 1 Stark. 351.

In describing the *local situation* of property, care must be taken that the description correspond with the proof, as a variance would be fatal: B. N. P. 89; 2 Roll. Ab. 678; *Taylor v. Hooman*, 1 Moo. 161; 2 Camp. 4; 5 B. & A. 201; *ante*, 450. If a close be described as abutting towards the east, and it proves to be north, inclining to the east, it is sufficient: 2 Roll. Ab. 678; see 1 Taunt. 801; *ante*, 450. [Declaration for seizing pigs; plea, that defendant was possessed of a close named H., in which the pigs were eating, &c. and were taken damage feasant; replication, that the defendant was not possessed of the said close in the said plea mentioned, in which the pigs were alleged to be eating, &c.: and issue thereon. There were several adjacent closes called H.: Held, that the defendant was bound to show that he was possessed of a close in which the pigs were eating, &c., and that it was not enough for him to show his possession of a close named H. *Bond v. Downson*, 2 Ad. & E. 26.] The court will not in this action try a question of parochiality: 2 Camp. 4. If there be any removal of, or injury to, personal property, it is usual to add a count to meet it, in order to avoid the effect of a misdescription in the other count for the injury to real property: 1 T. R. 479.

The *injury itself* is stated without any inducement of the *def.*'s motive

or intent, or of the circumstances under which the injury was committed; it should be stated directly and positively, and not by way of recital; and, therefore, a declaration "for that whereas," or "wherefore" the defendant did the act, complained of, is bad on special demurrer, 2 Salk. 636, 1 Str. 621, Com. D. *Pleader*, c. 86: except in the Common Pleas, where the supposed writ is recited, when it will not be objectionable, even on special demurrer: 2 Str. 1151, 1162; 1 Wils. 99: Com. D. *Pleader*, c. 86. In the statement of these injuries, the words "with force and arms," or *vi et armis* should be adopted, Com. D. *Pleader*, 3 M. 7, 1 Saund. 81, 82, n. 1, 140, n. 4; though the only mode of taking advantage of the omission is a special demurrer: 4 & 5 Anne, c. 16, s. 1. A property or possession in the plt. in the property injured, must be stated: Com. D. *Pleader*, 3 M. 9. If there were a substantive and independent injury to personal property, it is advisable to state such injury in a distinct count, on account of costs, &c., Tidd, 8 ed. 1000, 7 Moo. 269; and see *supra*, as to its being advisable\* to add such count where plt. declares for an [\*856] injury to real property: as to the mode of describing property, *ante*, 338. No unnecessary matter should be stated. The plt. may, however, recover *pro tanto*, though he fail in proving the residue of the facts stated: R. T. H. 121; 2 Saund. 74, b.

As to the statement of the *damages*, &c. *alia enormia*, see *ante*, 520, 344; *post*, 865.

The *conclusion* in trespass should be "against the peace of the king:" the omission of such words, however, can only be taken advantage of by special demurrer, see 1 Chit. Pl. 337; *sed quere*, if such omission be now objectionable.

[Before pleading, the defendant may have and call for particulars of the damage. But the court will not grant particulars in an action of trespass, on the mere affidavit of the defendant that he had read the declaration, and that from its general and vague form he was unable to ascertain the grievances on which the plaintiff intended to rely; but some special ground must be shown as a reason for granting the rule: *Horlock v. Le-diard*, 10 Mees. & W. 677.]

*Plea, General Issue.*] The deft. may, under the *general issue*, give in evidence any matter which directly controverts the truth of any allegation, which the plt. on such general issue will be bound to prove, 2 Saund. 159, n. 10, 1 Chit. Pl. 437; and no person is bound to justify who is not, *prima facie*, a trespasser, Cowp. 478; but, where the act would at common law, *prima facie*, appear to be a trespass, any matter of justification or excuse, or done by virtue of a warrant or authority, must in general be specially pleaded: Co. Lit. 282, b. 283, a.; Doug. 611; 2 Roll. Ab. 682; 12 Mod. 120; 1 Saund. 298, n. 1; Com. D. *Pleader*, 15, 16, 17; 1 Chit. Pl. 438.

In trespass to *personal property*, in general, matters which admit the plt.'s property, as well as the seizure, &c. must be pleaded, Com. D. *Pleader*, 3 M. 25, 1 Chit. Pl. 439, and cases there cited; but the deft. may, under the general issue, show that the chattels in question, were not plt.'s property: 2 W. Bl. 701. The deft. may show under this plea, by virtue of the 11 G. 2, c. 19, s. 21, that he took the goods as a distress for rent, but if the goods were taken clandestinely from off the premises, and afterwards seized by deft., that must be pleaded specially, *Vaughan v. Davis*,

1 Esp. Rep. 256, 6 Camp. 136; see *ante*, "Justices," "Officer," &c. as to their pleading the general issue only.

In trespass to *real* property, a freehold or mere possessory right in the defendant may be given in evidence under the general issue, 7 T. R. 354, 8 T. R. 403, Andr. 108, Willes, 222; but it is usual, and frequently advisable, to plead *liberum tenementum*: 1 Saund. 299, *b*. The deft. cannot justify, under the general issue, cutting the post and rails of the plt., though erected upon the deft.'s land, there being no question raised as to the property remaining in the plt.: 8 East, 404; *sed quære*, see 8 T. R. 403. An excuse of the trespass, Co. Lit. 283, 2 Saund. 285; and a license from the plt. 2 T. R. 168, Hob. 175, Com. D. *Pleader*, 3 M. 35; and a justification in respect of any *easement* or incorporeal right, 1 H. Bl. 352, 2 Saund. 402, *n*. 1, Com. D. *Pleader*, *E*. 15, must be pleaded. So, an entry by authority of law without process, Com. D. *Pleader*, 3 M. 35, or by virtue of process of a court, must be pleaded: 3 B. & P. 223; 7 T. R. 655; 1 Saund. 298, *n*. 1. Matters in discharge of the action must be pleaded, 3 Burr. 1353, 1 W. Bl. R. 388, 1 Wils. 45, 1 Chit. Pl., as accord and satisfaction, &c.: see *ante*, "Release," "Judgment Recovered," "Limitation," "Award." As to pleas in trespass to persons, *ante*, "Assault," "False Imprisonment;" as to pleas by "Justices," "Officers," &c. see those titles.

*Replication.*] We have already considered how to reply to a declaration in trespass to persons: *ante*, 97, 517. In trespass to personal property, where the deft. has in his plea merely justified, in his own right, the doing the act, the plt. may in general reply, *de injuria*, 1 East, 212, 1 Chit. Pl. 513; but, if the deft. has justified as servant of another, Willes, 99, 1 B. & P. 80, this replication will not suffice. If the justification be under a distress for rent, Willes, 52; or the taking and impounding, and not merely the chasing of cattle, Willes, 101, Cro. J. 225; or if the [\*857] justification be under \*a *feri facias*, or other process, the replication must not be *de injuria* generally, but must state the particular answer to the plea: *ante*, 517. Where the answer to the plea confesses and avoids it, the replication should be special: 3 Wils. 26; 1 Salk. 221; Cro. J. 147; 1 Chit. Pl. 514. In trespass to *real* property, if the deft. has justified as servant or bailiff of a freeholder or termor, the plt. cannot traverse the deft.'s authority, because he would leave unanswered the other parts of the plea, and thereby admit that another person is entitled to the possession; but, if both parties claim under the same person, the command is traversable: 1 East, 245; 1 Saund. 347, *c*. *n*. 4. To a plea of escape of cattle through defect of fences, which the plt. ought to have repaired, it is said that, as the plea contains mere matter of excuse, the plt. may reply *de injuria*, Willes, 54, Com. D. *Pleader*, 3 M. 29, 1 Chit. Pl. 516; or he may deny, in particular, the obligation to repair, or the defect of the fences, or the deft.'s right to put the cattle in the close, adjoining the *locus in quo*, concluding to the country, *ib.*, 1 Saund. 103, *b*.; but he should reply specially, that the deft. turned the cattle into the *locus in quo*, or that they were unruly, and conclude with a verification: Lutw. 1358-9; Com. D. *Pleader*, 3 M. 29. As to the mode of replying to a plea which gives colour, see 1 Chit. Pl. 446; as to the mode of replying to the pleas of *liberum tenementum*, license, right of way, common, see those titles, *ante*, and *post*, "Way;" as to new assignments, see *ante*, "New Assignment."

*Precedents.*

## COMMENCEMENT AND CONCLUSION OF DECLARATION BY BILL IN K. B.

Ellenborough.

Trinity Term, 9 Geo. 4.

———(venue) to wit. A. B. complains of C. D., being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself of a plea of trespass, for that, &c., and other wrongs to the said plt. then and there did, against the peace of our said lord the king, and to the damage of the said plt. of £—; and therefore he brings his suit, &c. Pledges, &c.

## THE LIKE IN C. P.

In the C. P.

Trinity Term, 9 Geo. 4.

——— to wit. C. D. was attached to answer A. B. of a plea of trespass, and thereupon the said A. B. by E. F., his attorney, complains, for that, &c., and other wrongs to the said plt. then and there did, to the great damage of the said plt. and against the peace of our said lord the king. Wherefore the said plt. saith that he is injured, and hath sustained damage to the amount of £—; and therefore he brings his suit, &c.

See forms of declaration in trespass to persons, *ante*, 99, 517, 395.

## COMMON COUNT, DE BONIS ASPORTATIS.

(*This is usually used as a second or subsequent count.*) And, also, for that the said deft., on the — day of —, A. D. —, with force and arms, &c., to wit, at, &c., aforesaid, in the county aforesaid, seized, took, and carried away, certain goods and chattels, to wit, &c., (*here describe the goods, &c. as in trover, post, 871-2. If the property be animate, say, "seized, took, drove, and led away, certain cattle and chattels, to wit, &c."*) of the said plt., of great value, to wit, of the value of £—, of lawful money of Great Britain, there then found and being, and converted and disposed of the same to his own use.

See other forms of declarations in trespass to personal property, for chasing sheep, &c. with special damage, 2 Chit. Pl. 858-9; for seizing chattels as a distress, *ib.*, 859; for shooting a dog, *ib.*, 860; for running down plt.'s carriage, *ib.*; for seizing plt.'s cart and horse, *ib.*, 861; for seizing and detaining his barge, *ib.*, 862; for seizing boat, and putting it adrift, *ib.*, 863.

## DECLARATION FOR TRESPASS IN DWELLING-HOUSE, AND SEIZING GOODS THEREIN.

For that the said deft., on, &c., and on divers other days and times between that day and the day of exhibiting this bill, (or, *if in C. P.*, "the \*commencement of this suit,") with force and arms, &c., broke and entered a certain dwelling-house of the said plt., situate and being in the parish of —, in the county of —, (*do not state more of the following alleged trespasses than will agree with the fact,*) and then and there made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance for a long space of time, to wit, for the space of — days then next following, and then and there forced and broke open, broke to pieces, and damaged divers, to wit, — doors of the said plt., of and belonging to the said dwelling-house, with the appurtenances, and broke to pieces, damaged, and spoiled divers, to wit, five locks, five bolts, five staples, and five hinges, of and belonging to the said doors respectively, and wherewith the same were then fastened, and of great value, to wit, of the value of £—; and also, during the time aforesaid, to wit, on the said — day of —, seized and took divers goods and chattels, to wit, (*describe the goods, &c. as in trover, post, 871-2.*) of the said plt., then found and being in the said dwelling-house, and being of great value, to wit, of the value of £—, and carried away the same, and converted and disposed thereof to his own use. By means of which said several premises he, the said plt., and his family, were, during all the time aforesaid, not only greatly disturbed and incommoded in the peaceable possession of the said dwelling-house of the said plt., but also he, the said plt., was, during all that time, hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, to wit, at, &c., aforesaid. [\*858]

## COUNT FOR A COMMON EXPULSION.

And, also, for that the said deft., on the day and year aforesaid, with force and arms, &c., broke and entered a certain other dwelling-house of the said plt., situate in the county aforesaid, and then and there ejected, expelled, put out, and amoved, the said plt. and his family from the possession, use, occupation, and enjoyment of the said last mentioned dwelling-house, and kept and continued them so ejected, expelled, put out, and amoved, for a long space of time, to wit, from thence hitherto; whereby the said plt. for and during all that time, lost and was deprived of the use and benefit of his said last mentioned dwelling-house, to wit, at, &c., aforesaid.

## FOR TRESPASS IN CLOSES, WITH CATTLE AND CARTS, &amp;c.

For that the said deft., on, &c., and on divers other days and times between that day and the day of exhibiting this bill (or, if in C. P., "before the commencement of this suit") with force and arms, &c., broke and entered into divers, to wit, two (*insert a sufficient number*) closes of the said plt., situate, lying, and being in the parish of —, in the county of —, and then and there forced and broke open, broke to pieces, damaged, and spoiled divers, to wit, two gates of the said plt., of great value, to wit, of the value of £10, then standing and being in the said closes, and the locks, staples, and hinges, to wit, 10 locks, 10 bolts, 10 staples, and 10 hinges, of the said plt., of great value, to wit, of the value of £10, respectively affixed to the said gates, and with which the same were then respectively locked and fastened, and with feet in walking trod down, trampled upon, consumed, and spoiled the grass, herbage, and corn, of the said plt., of great value, to wit, of the value of £50, there then growing and being, and with cattle, to wit, horses, mares, geldings, cows, oxen, and sheep, eat up and depastured the grass, herbage and corn, of the said plt., of great value, to wit, of the value of £50, then growing and being in the said closes, and with divers other horses, mares, geldings, sheep, and cattle, and also with the wheels of divers carts, wagons, and other carriages, crushed, damaged, and spoiled other the grass, herbage, and corn, of the said plt., of great value, to wit, of the value of £50, there then also growing and being, and, with the feet of the said horses, mares, and geldings, and with the wheels of the said carts, wagons, and other carriages, tore up, subverted, damaged, and spoiled the earth and soil of the said closes, and thereby greatly injured and spoiled the said closes, and hindered and prevented the said plt. during the time aforesaid, from having the use and enjoyment thereof in so large and ample a manner as he might and otherwise would have done, to wit, at, &c., aforesaid.

[\*859] \*See precedents of declaration on stat. H. 6. c. 9, for a forcible entry and detainer, 2 Chit. Pl. 865; for breaking into close, setting out the abutments, *ib.* 869; for cutting down, &c., trees, *ib.* 869; for laying wood in a close, *ib.*, for digging in coal-mine, *ib.* 870; for hunting in, *ib.* 872-3, for meane profits, *ante*, 668.

## PLEA OF GENERAL ISSUE.

In the K. B. (or C. P., or Exchq.) Trinity Term, 9 Geo. 4.  
 C. D. } And the said deft., by E. F., his attorney, comes and defends the force and  
 ata. } injury, when, &c., and says that he is not guilty of the said supposed trespass  
 A. B. } above laid to his charge, or any or either of them, or any part thereof, in manner  
 and form as the said plt. hath above thereof complained against him. And of this he,  
 the said deft., puts himself upon the country, &c.

See the commencement and conclusions of other pleas, *ante*, 725. See plea of general issue as to part, with commencement of a special plea as to residue, 3 Chit. Pl. 1061.

## PLEA, JUSTIFYING THE REMOVAL OF GOODS ON ACCOUNT OF INCUMBERING PLT.'S HOUSE.

And, for a further plea in this behalf, as to the seizing, taking, removing, and carrying away, the said goods and chattels in the said second count mentioned, the said deft., by leave, &c. (*actio non, &c. as ante*, 725), because he saith that, before and at the said time, when, &c., he, the said deft. was lawfully possessed of a certain dwelling-house and premises, situate at, &c.; and because the said goods and chattels in the said second count mentioned, before and at the said time, when, &c., in the said second count men-

tioned, were wrongfully in and upon the said dwelling-house and premises, incumbering the same, and doing damage there to the said deft., he, the said deft., at the said time, when, &c., in the said second count mentioned, seized and took the said goods and chattels in the said second count mentioned, in the said dwelling-house and premises, so incumbering the same, as aforesaid, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use of the said plt., doing no unnecessary damage to the said goods and chattels on the occasion aforesaid, and as he lawfully might, for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plt. hath above thereof complained against him, the said deft. And this, &c. (*Conclude with a verification, as ante, 725.*)

See other forms of pleas in bar to trespass to *personal property*, justifying a distress of cattle damage feasant, 3 Chit. Pl. 1092; justifying taking coals under prescriptive right to port duties, *ib.*; justifying killing dog for worrying sheep, *ib.*, 1097.

See pleas justifying trespass to *real property*, as *liberum tenementum*, enumerating the trespasses, 3 Chit. Pl. 1097; and the like in a more concise form, *ib.*; plea, stating *seisin in fee* by a copyholder, 3 Chit. Pl. 1100; justifying by tenant for years, giving colour to plt., *ib.* 1101; the like by a tenant from year to year, *ib.*, 1102; justifying cutting trees, because overshadowing plt.'s garden, &c. *ib.*; defect of fences, *ib.*, 1103; license, *ante*, 633; plea to trespass for fishing, that *locus in quo* was deft.'s freehold, 3 Chit. Pl. 1106; the like that the fishery was deft.'s several fishery, *ib.*, 1107; the like that deft. has a free fishery in the fishery, *ib.*, 1108; common of fishery, *ib.*; *locus in quo*; a navigable river, and a public right to fish therein, *ib.*; see plea by a freeholder, a prescriptive right of common of pasture, *ib.*, 1109, *ante*, 374-5; the like by a copyholder, 3 Chit. Pl. 1111; prescriptive right of common by rector, *ib.*, 1112; common *pur cause de vicinage*, *ib.*, 1113; common of estovers, &c., *ib.*, 1115; public way for carriages, &c., *ib.*, 1116, *post*; private way, by prescription by a freeholder, 3 Chit. Pl. 1118, and *post*; the like by a copyholder, 3 Chit. Pl. 1120; prescriptive right of way, that deft. has closes at both ends of way, *ib.* 1121; private way, by non-existing grant, *ib.* 1122; the like in another form, *ib.* 1123; the like of necessity, *ib.*, 1125; the like by tenant under a lease, or from year to year, *ib.*, 1127; the like to a well, \*to take water by prescription, [\*860] *ib.*; plea justifying entry to take tithe, *ib.*, 1128; the like under a *latitat*, *ib.* 1130; the like under a *fi. fa.* against plt., *ib.* 1132; the like under a *fi. fa.* against another person, *ib.*, 1134; the like by sheriff, under a *fi. fa.*, *ib.*, 1135; by surveyor, under highway act; 13 G. 3. c. 78, *ib.*, 1136; justifying entry to make distress on goods fraudulently removed, *ib.*, 1137.

#### COMMENCEMENT OF A REPLICATION TO A SPECIAL PLEA IN TRESPASS, CALLED PRECLUDI NON.

And the said plt., as to the said plea of the said deft., by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith that he, the said plt. by reason of any thing by the said deft., in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said deft., because he saith that, &c.

#### CONCLUSION OF A VERIFICATION.

And this he, the said plt., is ready to verify; wherefore the said plt. prays judgment and his damages, by him sustained by reason of the committing of the said trespasses, to be adjudged to him, &c.

#### REPLICATION OF DE INJURIA OR DE SON TORT DEMERNE.

(*Precludi non, as above.*) Because he saith that the said deft., at the said time, when, &c., of his own wrong, and without the cause by him in his said second plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the said plt. hath above in his said declaration complained against him, the said deft.; and this he, the said plt., prays may be inquired of by the country, &c.

See precedents of replication to pleas to *personal property*, to a justification of distress *damage feasant*, demise by E. F. to plt., and *de injuria*, 3 Chit. Pl. 1205; to a justifica-

tion for taking cattle *damage feasant*, the plt. had right of common in *locus in quo*, *ib.*, 1206; to the like, defect of fences, *ib.*; to the like, that deft. converted distress, *ib.*, 1207; the like under a *f. fa.*, that writ of error allowed, *ib.*

See precedents of replication to pleas to *real property*, to *liberum tenementum*, denial of plea, 3 Chit. Pl. 1208; to *liberum tenementum*, demise by deft. to plt., *ib.*, 1209; to a plea of license, denial of license, *ib.*; to plea of license, a countermand, *ib.*, 1210; to plea of defect of fences, that deft. turned the cattle in, *ib.*; to the like, that deft.'s cattle were unruly, &c., *ib.*; to plea of prescriptive right of common, denial of the right, *ib.*, 1211; to plea of right of common, approvement of common, *ib.*, 1212; observations on traverses of rights of common and ways, in general, *ib.*

#### REJOINDER OF SIMILITER TO REPLICATION.

C. D. } And the said deft., as to the said replication of the said plt., to the said  
ats. } second plea of him, the said deft., and which the said plt. hath prayed may be  
A. B. } inquired of by the country, doth the like.

#### REJOINDER TO A REPLICATION, CONCLUDING WITH A VERIFICATION. CONCLUSION TO THE COUNTRY.

And the said deft., as to the said replication of the said plt. to the said third plea of him, the said deft., saith that the said plt. ought not, by reason of any thing by him in that replication above alleged, to have or maintain his aforesaid action against him, the said deft., in respect of the said supposed trespasses in the introductory part of the said third plea, and in the said declaration mentioned, because he saith that, &c. And of this he, the said deft., puts himself upon the country, &c.

#### CONCLUSION WITH A VERIFICATION.

And this he, the said deft., is ready to verify; wherefore, as before, he prays judgment if the said plt. ought to have or maintain his aforesaid action thereof against him, the said deft., in respect of the said supposed trespasses in the introductory part of the said third plea, and in the said declaration, mentioned, &c.

#### REJOINDER TO REPLICATION OF EXCESS, DENYING ILLEGAL EXCESS.

[\*861] (*Actio non, as above.*) Because he saith that he did not, to a greater degree, or with more force or violence than was necessary for the said \*purpose in the said last plea mentioned, commit the said supposed trespasses in the introductory part of the said last plea mentioned, in manner and form as the said plt. in his said replication in that behalf alleged; and of this he, the said deft., puts himself upon the country, &c.

#### *Evidence for Plaintiff in Trespass to PERSONAL PROPERTY.*

As to evidence in action for trespass to *persons*, see *ante*, 103, and *ante*, 520.

*Under GENERAL ISSUE.*] We have seen what this plea puts in issue, *ante*, 856. Plt. must, under it, be prepared to show, that *the thing* injured is the subject of an action of *trespass*, the plt.'s *right* thereto, the *injury*, and that *deft. committed* the injury, and the *damages*.

*Proof that the Thing injured may be the Subject of this Form of Action.*] We have already seen what personal property may be the subject of an action of trespass, *ante*, 854. For an injury to animals, *feræ naturæ*, and not generally merchantable, it should be proved that they have been reclaimed or dead, or at least that plt. was actually *possessed*



of them: *Bac. Ab. Trespass*, 1 Cro. J. 262. In trespass for taking fish, plt. should show that the fish were edible and valuable: 5 Rep. 35; 11 Mod. 74; 3 Salk. 9; B. N. P. 79; see *Duke of Somerset v. Fogwell*, 5 B. & C. 879. If the action be for taking away a hare or rabbit, &c., killed on the plt.'s land, plt. should prove it is his land, 2 Salk. 556, 1 Ld. Raym. 251; or if not killed on plt.'s land, he should prove it was started therefrom, and that he pursued it: Cro. C. 554; Godb. 123; Salk. 556.

*Proof of Plaintiff's Right in the Thing Injured.*] The plt. must show that, at the time when the injury was done, he had either the *actual possession*, or else a *constructive possession*, in the thing injured, as also a general or qualified property therein: 1 T. R. 480; 4 T. R. 490.

Proof of *actual possession* by the plt. of the chattel at the time of the trespass will in all cases suffice to maintain this action against a mere wrong-doer, not being the *real owner* of the chattel, 2 Saund. 47, *d.*, 4 Taunt. 547: and this, although such plt. had the wrongful possession, *ib.* 1 East, 244; Cro. Eliz. 819, 2 Marsh. 293, or was the mere finder of the chattel, *ib.* Such proof of actual possession will suffice, where plt. is a bailee, coupled with an interest, as a carrier, factor, pawnee, &c. 2 Saund. 47, *b.* 1 Rol. Ab. 551, or even a gratuitous bailee, 1 B. & A. 59; but he cannot sue, if he be a mere servant, Owen, 52, 3 Inst. 103, 2 Saund. 47, *b. c. d.*; and a distrainer of goods has neither such an actual nor constructive possession in the chattel seized, as will enable him to bring trespass for an injury, the goods, till sold, being in the custody of law, 1 McC. & Y. 118, and he who has in his possession before the seizure is the proper person to sue for the injury: *Abr. Bro. Property*, 52, cited in 1 McC. & Y. 118. A sheriff, having duly seized goods under a *fi. fa.*, has such a special property in them, to enable him to support this action, against any person taking them out of his possession: 2 Saund. 47; 1 Vent. 52; 1 Lev. 282; and see *Saule v. Paynter*, 1 D. & R. 307. But the sheriff, in order to maintain this action, must continue in actual possession of the goods; for, where a sheriff's officer seized a table in the name of all the goods in a house, and locked up his warrant in the table-drawer, and left the house, it was held, the sheriff could not sue the landlord, who afterwards distrained the goods for rent, *Blades v. Arundale*, 1 M. & S. 711; and, where the sheriff seizes goods in the possession of the deft. which he obtained by fraud, the sheriff cannot maintain an action against the real owner for rescuing them \*out of his custody, see *Earl* [\*862] *Bristol v. Wilmore*, 2 D. & R. 755, 1 B. & C. 514, *s. c.*; as to his re-seizing goods for poundage, see 7 B. & C. 26.

Proof of the plt. having the *absolute or general property* over the chattel, without proof of actual possession, is sufficient to maintain this action, for the general property of personal chattels, *prima facie*, draws to it a possession: 7 T. R. 9. The owner of goods, though he has deposited them in the hands of a bailee, may maintain trespass for the taking of them, because he still has the general property, 7 T. R. 12, 16 East. 33, in which case there is also a mixed possession, viz. actual possession in the bailee, and an implied possession in the owner, 4 T. R. 490; and the lord of a manor may recover in trespass for an injury done to an estray, or for the taking away a wreck before seizure by him, against a stranger, the right being actually vested in him: 1 T. R. 480.

So, an executor, for the goods of his testator, *ib.*, or the executor of an executor, Com. Dig. *Tres. B.* 5, or an executor *de son tort*, 1 Chit. Pl. 51; and the owner of tithe may support trespass after it has been set out, against a person for injuring it: 8 T. R. 72. The vendee of goods, even before delivery, has a property sufficient to maintain this action, Com. Dig. *Tres. B.* 4; and the factor or consignee of goods, before actual possession, has such a constructive one as will enable him to bring trespass: 1 B. & P. 47. So has a legatee after having obtained the executor's assent to the legacy, and he may bring trespass for an injury committed before such assent: Bro. Ab. *Tres.* 25. Where the *bona fide* assignee of a bill of sale, executed by the sheriff under a *fi. fa.* against the goods of A., allowed the latter to remain in the possession and enjoyment of the goods, until another execution was put in, and the same effects were again seized, it was held that, the first execution being notorious, the assignee of the bill of sale might maintain trespass against the sheriff, and that an absolute change of possession was not necessary to give effect to the bill of sale against creditors: *Latimer v. Batson*, 7 D. & R. 106, *s. c.*; 4 B. & C. 652. The landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass *vi et armis* against a third person, for carrying it away, after it has been cut down: *Ward v. Andrews*, 2 Chit. Rep. 636; *post*, 875. And a lessor may have an action of trespass against his lessee, for felling or damaging trees, though not excepted in the lease: 1 Saund. 322, *n.* 5; 7 T. R. 13. But, where goods are delivered out of the possession of the general owner, and intrusted to a person, who is to have the *exclusive* right to use the thing, the general owner cannot maintain trespass for the injury done by a stranger, while such person continues to have such possession and right: 1 Chit. Pl. 154; 4 T. R. 490; 7 T. R. 11; 3 Camp. 187. Nor can the general owner support this action, against those persons with whom the actual possession and exclusive right of property resides, for a mere abuse of the goods intrusted to them, though, if there be a destruction of the chattel, they are liable in trespass for the injury: 2 Saund. 47, *g.* If the owner of a chattel gratuitously permit another person to use it, he may maintain trespass for an injury done to it, while it is so used, 2 Camp. 464, though it is otherwise, where the chattel is let to hire: *Croft v. Alison*, 3 Camp. 187, 4 B. & A. 590; *Ward v. McCauley*, 4 T. R. 489. Where a lessor, during the term, cut down some oak pollards growing upon the demised premises, which were unfit for timber, it was held that, as a tenant for life or years would have been entitled to them, if they had been blown down, and was entitled to the *usufruct* of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently, that he, or his vendee, could not maintain trespass against the tenant for taking them: *Channon v. Patch*, 5 B. & C. 897.

Proof of the plt. having a *special* property in the chattel, at the time of the injury, without proof of actual possession, will sometimes [\*863] suffice to \*maintain this action, as in the case of a bailee, with an authority from the absolute or general owner, coupled with an interest, 1 B. & P. 45, 2 Saund. 47, *d.*; as a factor, or consignee of goods, 7 T. R. 359. A tenant for years may support trespass for cutting down trees, unless they were excepted in the lease, though he cannot support trespass for carrying them away: see 2 Camp. 491; 2 M. & S.

499; 2 Salk. 638. A shopkeeper, to whom goods were sent to be sold, or returned, has such a special property in them, which being coupled with possession, was sufficient to enable him to bring trespass against a person for taking them away: 2 Camp. 576.

Trespass may be supported by a bankrupt for goods acquired since his bankruptcy, against a wrong-doer, 7 T. R. 397; but not for goods acquired before: 1 C. & P. 147. A bankrupt's assignees cannot maintain this action against a sheriff, for taking the goods of the bankrupt in execution, after bankruptcy, 1 T. R. 475, but before the issuing of the commission. By assignment, the assignees of bankrupt take all the subsequently acquired property as well as the property possessed by him at the time of his bankruptcy, 2 H. Bl. 444; and, though we have seen that a bankrupt may bring trespass for goods acquired since his bankruptcy, yet he cannot do so, if the assignees interfere, 7 T. R. 397; and for goods acquired by him before the act of bankruptcy, he cannot maintain any action, even if the assignees do not interfere, 1 C. & P. 147; so that assignees for any injury committed to the property of the bankrupt, which they, by law, have the possession of, may maintain trespass for such injury, 2 H. Bl. 444, though the bankrupt himself, for a personal injury, as assault and battery, slander, and the like, must sue in trespass for such injury; and in which case his assignees cannot support this action: Sir W. Jones, 215. In the case of an insolvent, *Abbott, C. J.*, 1 C. & P. 147, considered it as analogous to that of bankruptcy, as far as the property previously or subsequently acquired by him was concerned, except where the defendant has acquired a property in the goods under a warrant of attorney and judgment, in which case the Insolvent Court is authorized, under 1 G. 4, c. 19, s. 25, to issue execution: 2 Bing. 372; see *ante*, 251, 588.

*Proof of the Injury, and that Deft. committed it.*] We have already seen of what nature the injury must be, in order to maintain this action. It must be immediate, and committed with force: *ante*. It must be shown that the deft., or his servant, by his command, committed the injury. All the parties to the trespass need not be joined: 6 Taunt. 29, 35, 42. There can be no doubt but that every person is liable for his own immediate act; but he may also be liable for the acts of another, and all persons who direct or assist in committing a trespass, are in general, liable as principals, though not benefitted by the act, 2 Saund. 47, *i.*, B. N. P. 41; and an agent or servant is equally liable as principal, whether the tortious act be done by the authority of his master or not: *ib.*; 12 Mod. 448; 1 Wils. 328; 1 Chit. Pl. 72. We have already considered the liability of a sheriff: see *ante*, 791-2. In a late case it was held, that the vendee of a growing crop of grass, who is in possession of the field for the purpose of making it into hay, may maintain trespass against the sheriff, if, when cut, the close be entered, and part of the grass carried away by a person who has purchased the grass of a bailiff of the sheriff, who had seized and sold it under a *fi. fa.* against the original vendor, where the person actually entering claims under the sale of the sheriff's bailiff, and carries off the crop by his authority: *Tompkinson v. Russell*, 9 Price, 287, *s. p.*; 6 East, 602. See, further, as to the liability of an agent, *ante*, 74; as to the liability of justices, *ante*, 613-4.

A party who sues out execution is liable for the illegal or improper seizure made by the sheriff or officer, if he assented thereto; but such assent

[\*864] \*must be proved, as, by his having been in company with the officer at the time of the seizure, 1 B. & P. 369, or having indemnified the sheriff in selling the goods, B. N. P. 41, or having received the goods or money levied, 1 M. & S. 583. And, where A. employed B., an attorney, to enforce payment of a debt, and B. directed his agent to sue out a *justicies*, in the county court, and before the return of the *justicies*, the debtor paid the debt and costs to B., and his agent, not knowing of such payment, afterwards entered up judgment in the county court, although the debt had not appeared, and sued out execution, under which the goods of the plt. were seized, it was held that both A. and B. were liable as trespassers: *Bates v. Pilling*, 6 B. & C. 38. The mere act, however, of a stranger, of making an inventory, or drawing a notice of distress, is not such an inference as will subject him to an action: 2 Esp. Rep. 553. If the sheriff or a stranger illegally take the goods of another in execution, and sell and deliver them to a third person, trespass cannot be supported against the latter, because they came to him without fault on his part, 2 Roll. Ab. 556, *pl.* 50; Bro. Ab. *Trespass*, *pl.* 48; but, if a second trespasser take goods out of the custody of the first trespasser, the owner may support trespass against such second taker, his act not being excusable: Sid. 438. If A. take the goods of C., and B. take them from A., C. may sue A. or B.; Bac. Ab. *Actions*, B.

The owner of an animal *mansuetæ naturæ* is sometimes liable in trespass for an injury committed by it; as, if the animal were naturally of the propensity to do the mischief complained of, as horses and cattle to trespass on land, though the owner had no notice, in fact, of their propensity, he is liable for such mischief, in trespass: 2 Roll. Ab. 568; N. L. 15; 3 Bl. Com. 211; 1 Ld. Raym. 608, 1583; Bac. Ab. *Trespass*, G. 2. But a person from whose lands animals, *feræ naturæ*, as rabbits, &c., escape, is not liable for an injury done by them: 5 Rep. 104; 1 Burr. 259. Trespass, however, may be supported for an injury committed by animals *feræ naturæ*, or notoriously ferocious, and which have not been properly confined: 2 Ld. Raym. 1583; 3 East, 595-6; see 1 Chit. Pl. 70. A person cannot be liable for the act of cattle, unless, he be proved to be the general owner, or he actually sent them into the place where the injury was committed: 1 Saund. 27. If the cattle of A. be agisted by B., and they escape into plt.'s land, &c. B. or A. may be sued: Clayton, 32-3.

In general, trespass is not sustainable against a bailee who has the possession, coupled with an interest, unless he destroy the chattel, 1 Chit. Pl. 57, 157, 7 T. R. 7, 11; nor against a joint-tenant in common, for merely taking away, and holding exclusively the property from his co-tenant, 1 T. R. 658, Cowp. 430, 2 Saund. 47, *g.*, 1 Chit. Pl. 67, because each has an interest in the whole, and a right to dispose thereof, 1 Lev. 29, 8 T. R. 145, Co. Lit. 200, *a.*, Cowp. 217; 4 East, 121; but, if the thing be destroyed, trespass lies, Co. Lit. 200, *a.*, as, if a tenant at will cut down trees, trespass lies; 7 T. R. 11; Co. Lit. 57, *a.*, &c. And this action may be supported against a bailee who has only a bare authority, 1 Leon. 87, Cro. El. 781, 5 Co. 13, *b.*; and it lies by an out-going tenant against the in-coming tenant, for taking the manure though the latter had a right to it on paying for it: 16 East, 116. One joint tenant, or tenant in common, may support trespass against his co-tenant, when the chattel is destroyed: 2 Saund. 47, *b. g.*; 8 T. R. 146; see *post*.

A party may be liable for a trespass in respect of his *previous* consent,

or request, that the trespass might be done; as, if A. command or request B. to commit a trespass towards C., and B. do it, this action lies against A., as well as against B: 1 Camp. 187; 2 W. Bl. R. 1055; Com. D. *tit. Trespass, C. 1*. It may also be supported against a person, not being an infant, or *feme covert*, who afterwards assents to a trespass committed for his *use* or *benefit*, Cowp. 478, 3 Wils. 377; for, in such case, his subsequent\* assent amounts to a command, according to the [\*865] *maxim omnius ratihabitio ratrohabitur et mandato priori æquiparatur*, 3 Moo. 519: but such subsequent assent would not subject him to an action for a forcible entry: 4 Inst. 317; Co. Lit. 180, *b. n. 4*. But, without such consent, trespass does not, in general, lie; as, if A. command his servant to do a lawful act, as to distrain the goods of B., and he wrongfully take the goods of C., A. is not liable, 3 Wils. 312, 317, 1 East, 108, the liability of a sheriff being an exception: *ante*, 792. And the mere acceptance of goods illegally taken by another, does not always furnish evidence of an assent, 2 Roll. 555, *l. 50*; as, if a pound-keeper receive goods illegally distrained: Cowp. 476.

As to the liability of partners, see *ante*, 711; bankrupts, *ante*, 255; married women, *ante*, 572.

*Damages.*] Evidence must be adduced in support of the damages stated in the declaration. The intent with which the trespass was committed may be taken into consideration by the jury, in giving damages: 2 Stark. 213. Under the usual averment of damages called *alia enormia*, damages, and matters *naturally* arising from the act complained of, may be given in evidence in aggravation, though not stated specially, see B. N. P. 89; but plt. cannot, under this averment, show matter which would, of itself, be the subject of an action, as that deft. took away plt.'s horse, or that he debauched his daughter, whereby he lost her services, or the like, B. N. P. 89, Holt, C. N. P. 700, 1 Stark. 78; though he might give in evidence the mere debauching of his daughter: *ib.*; 6 Mod. 127.

In trespass for destroying a picture, deft. might show in mitigation, that it was a scandalous libel: in which case plt. would only recover the value of the canvas and paint: *Du Bost v. Beresford*, 2 Camp. 511.

*EVIDENCE UNDER SPECIAL PLEA.*] The evidence must depend on the issue taken. See the various titles of defences throughout the work. Where to a plea of justification the plt. has replied, *de injuria sua propria absque tali causa*, the whole matter of the plea is put in issue, and must be substantially proved, so far as it is material to constitute a plea of justification: see *Phillips v. Howgate*, 5 B. & A. 220. Where the plea consists of two parts, either of which would, if separately pleaded, amount to a good defence, it would suffice to prove either of those facts, *Spilsbury v. Michelthwaite*, 1 Taunt. 146; and it suffices for deft. to prove a justification which covers the trespass, although it does not cover the matter of justification, *Taylor v. Cole*, 3 T. R. 292, 1 H. Bl. 555, *s. c.*; and see *ante*, 97-8, 683, as to replying excess or new assigning.

*EVIDENCE FOR DEFENDANT.*] We have seen as to what deft. may give in evidence under the general issue, and evidence must be adduced accordingly; as to evidence in mitigation of damages, *supra*; as to evidence under special plea, see "*Accord and Satisfaction*," "*Limitations*," "*Judgment Recovered*," "*Award*," "*Common*," "*Way*," "*Liberum Tenementum*."

*Evidence for Plaintiff in Trespass to REAL PROPERTY.*

*Under GENERAL ISSUE.]* We have seen what this plea puts in issue, *ante*, 856. Plt. must, under it, be prepared to show that the *property injured* is the subject of an action of *trespass*; its *situation* as described; the *plt.'s right* thereto, the injury, and that *def't.* committed it and the damages.

*Proof that the Property Injured is the subject of an action of Trespass.]* We have already seen what real property may be the subject of an action of trespass: *ante*, 854. It must be something tangible or fixed.

[\*866] \**Proof of Situation of Property, as described.]* This must be established, see *ante*, 450, 855; as to what a variance, *post*.

*Proof of Plaintiff's Right to the Property injured.]* This being a possessory action, the *gist* of it is the injury to the *possession*, and, unless at the time the injury was committed the plt. be proved to have been in actual possession, the action cannot be supported, 5 East, 485-7; and, though the title may come in question, yet it is not essential to the action that it should: Willes, 221; 1 East, 244; 10 East, 65, 74. [Trespass quare clausum fregit: Pleas, 1st, not guilty; 2d, that the close was not *the close of the plaintiff*; 3d, that it was the soil and freehold of the defendant. Held, that evidence of *possession* was sufficient to entitle the plt. to a verdict on the second plea: *Heath v. Milward*, 2 Bing. N. C. 98.] There is no such *constructive* possession of the land and other *real* property, to enable a party to maintain this action, as there is in the possession of *personal* property: 5 East, 485; Bac. Ab. *Trespass*, C. 3.

Proof of *actual* possession, whether legal or not, is sufficient to maintain this action against a wrong-doer, or a person who cannot make out a title, *prima facie* entitling him to the possession: 1 East, 244; 3 Burr. 1563; 2 Str. 1238. Therefore a tenant for years, 2 Roll. Abr. 551, Sid. 347, a lessee at will, *ib.*, and a tenant at sufferance, *ib.*, 13 Co. 69, 1 East, 245, *n. a.* Com. D. *Trespass*, B. 1., 1 Saund. 322, *n.* 5, may support this action against a stranger, or even against his landlord, unless a right of entry be reserved, 11 Mod. 209, Co. D. *Biens*, H. 11 Co. 48; or unless the landlord have a right to re-enter by law; as where the tenancy has expired, and the tenant becomes a trespasser: *Turner v. Meymott*, 7 Moo. 574; 1 Bing. 158, *s. c.*; *Tuunton v. Costar*, 7 T. R. 431, *s. p.* A party having the legal title to land, having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards: *Bulcher v. Butcher*, 7 B. & C. 399. A servant, having the key and care of a house, may sometimes sue: 2 C. & P. 33. Where trees are excepted in a lease, the land on which they grow is necessarily excepted, also; consequently, if the tenant cut down the trees, the landlord may maintain trespass for breaking and entering his close, and cutting down the trees: *Rolls v. Rock*, 2 S. N. P. 1287. Where the owner of property gave certain commissioners leave to build a dam upon his ground, it was held the commissioners might maintain trespass against a stranger for breaking it down, 5 B. & A. 600, 1 D. & R. 225, *s. c.*; and, even without such permission on the part of the owner of the property,

trespass might be maintained; as, where the plt. placed posts on the land of a person. and the deft. took them away, it was decided that the plt. had sufficient possession to support trespass against the wrong-doer: 8 East, 394, recognized in 3 B. & A. 603. The court, in the last-mentioned case, 5 B. & A. 602, held that a person in possession of property, whether right-fully or wrongfully, may maintain trespass against a mere wrong-doer: 4 B. & C. 574; 6 D. & R. 572. The actual possession of crown lands, under a parol license from the crown, entitles the party in possession to maintain trespass against a wrong-doer: *Harper v. Charlesworth*, 6 D. & R. 572, *s. c.*; 4 B. & C. 574. By his induction, the parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe of land, although he has not taken actual possession of it, *Bulwar v. Bulwar*, 2 B. A. 470; and, on the determination of a lease at will, by the death of the lessee, the lessor may sue in trespass before entry; Co. Lit. 62, *b.*; 1 Lev. 202; and see 4 B. & C. 583; 6 D. & R. 572. Though the freehold of the church-yard is in the parson, trespass, and not case, lies against a person who wrongfully removes a tombstone from the church-yard, erected by the plt.'s wife during his absence as a transported felon: *Spooner v. Brewster*, 3 Bing. 136, *s. c.*; 2 C. & P. 34. The owner of the soil of a public way, *Mayor of Northampton v. Ward*, 1 Wils. 110, Str. 1004, or market, 1 Wils. 107, may maintain trespass against any one who makes use of it, extending beyond those privileges which the public possess, without the \*license of the owner. [\*867] Whenever there is an exclusive right, trespass may be supported for an injury committed during the existence of such right, though the party had not the absolute right of the soil, or the whole property therein, and however temporary his interest, 3 Burr. 1563, 1824, 5 East, 485-6-7, Cro. Eliz. 421; as, if a person have an exclusive right to cut turf and peat, or cut thorns, he may support trespass *quare clausum fregit*, and for cutting the turf, 3 Burr. 1560, 1824, 2 Salk. 638, 2 M. & S. 499; and it may be supported for a trespass in a portion of a common field, after the allotment to the plt.: Cro. Eliz. 421; 5 East, 480-5-6-7.

One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *quare clausum fregit*, against any person entering the close and taking the grass, even with the assent of the owner: *Crosby v. Wadsworth*, 6 East, 602: *s. p.*; 9 Price, 287. But, where a full grown crop of potatoes was purchased while in the ground, to be taken away immediately, it was held the purchaser had not such an interest in the profits of the soil, as would entitle him to maintain trespass *quare clausum fregit*: 11 East, 362. The possessor of herbage, or right of feeding cattle on certain closes, may maintain trespass against any person who infringes that right, or may even distrain cattle doing damage there: 5 T. R. 333. A copyholder, who holds under a special custom of the manor, a tenant for life, or tenant for years, may recover in this action damages against the lord of the manor, for cutting down so many trees as will deprive them of their right of estovers, &c.: B. N. P. 85, *a.* The lord or owner of the soil may support this action against a commoner, though he may have a right to enter if he commit any trespassable act: Cro. J. 195; Bac. Ab. tit. *Trespass*, C. 3. If the plt.

were in possession of the lands, &c., at the time when the injury was committed, the circumstance of his having quitted possession before the commencement of the action, constitutes no objection: *Bac. Ab. tit. Trespass, C. 3.*

Proof that the premises were, at the time of the injury, in the occupation, by a gamekeeper or other servant, of the plt., he not paying rent, will be evidence of the possession of the plt.: 16 East, 33, 36; *Lit. Rep.* 139. Paying rent for having the privilege of shooting over and taking the grass of lands is evidence of actual possession: 4 B. & C. 574; 6 D. & R. 572; and see further, as to evidence of seisin, *ante*, 457, 729. Cutting down trees in a way, or clearing it, is evidence to prove the right of soil of the way: *Berry v. Goodman*, 2 Leon. 148. If the plt. be proved to be owner of land on both sides of a river, he will be presumed to be the owner on the whole river: *Hargr. Law Tracts*, 5. Where there are two adjacent fields, separated by a hedge and ditch, the hedge, *prima facie*, belongs to the owner of the field in which the ditch is not; and, if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership: *Guy v. West*, 2 S. N. P. 1287, *per Bayley, J.*; and see *Bowles v. Miller*, 3 Taunt. 138. The property in a bank generally follows that of the soil from which it is contracted, but the property in a wall belongs to him who is bound to repair it: see *Duke of Newcastle v. Clarke*, 8 Taunt. 602; 2 Moo. 666, *s. c.*; see 5 Taunt. 20. As to the right to trees growing on boundaries of premises, see 1 *Ld. Raym.* 737; B. N. P. 85; 2 *Rol. R.* 141, 255. In general, waste land next adjoining a public high-way is presumed, *prima facie*, to belong to the owner of the land next adjoining such waste, and not to the lord of the manor, *Steel v. Prichett*, 2 Stark. 468; but such presumption may be rebutted; and, if the waste be contiguous to, or communicate with open common or larger portions of land, the presumption is either rebutted or considerably narrowed: see *Grose v. West*, 7 Taunt. 41; *Headlam v. Hedley*, Holt, C. N. P. 463.

\*On the other hand, if the party be not in *actual* possession, [\*868] he cannot sue; therefore, a landlord cannot, during a subsisting lease, support trespass, but the action of trespass should be in the name of the tenant, or the landlord must proceed in a case as a reversioner, unless the injury was committed to trees or other property excepted in the lease, or trees were carried away, when the latter may support trespass for cutting, injuring, or carrying away the same: *Bro. Ab. Trespass, Pl.* 55; 1 *Saund.* 322, *n.* 5; 7 *T. R.* 13; 8 East, 190; *Bac. Ab. Trespass, C.* 3; 4 Taunt. 316; 1 *Chit. Pl.* 52, 161. A mere right to enter is not sufficient; therefore, a parson, before induction, cannot maintain trespass, *Vin. Ab. Entry, G.* 4, *Trespass, S.* *Bac. Ab. Leases, M.*; nor can a lessee for years, *Bac. Ab. Leases, M.*; nor an assignee, &c., 1 *Ld. Raym.* 367, 1 B. & B. 245; nor an heir or devisee, *Plow.* 142, 2 *Mod.* 7; nor a purchaser, *Carter*, 66, *Com. D. Trespass, B.* 3, 2 *Rol. Ab.* 553, before entry: and see 1 *Chit. Pl.* 162. The commissioners of sewers cannot maintain an action of trespass against the commissioners of a harbour for breaking down a wall or dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them, on behalf of the public, does not vest in them such a property or possessory interest as will enable them to maintain such action: *Newcastle*



(*Duke*) v. *Clarke*, 8 Taunt. 602; 2 Moo. 666, s. c.; and see *Hollis* v. *Goldfinch*, 1 B. & B. 205; 2 D. & R. 316, s. c. A person having a right to sit in a pew has not the exclusive possession, and he cannot support trespass even against a stranger, the possession of the church being in the parson: 1 T. R. 430; *Clifford* v. *Wicks*, 1 B. & A. 498; and see *Rogers* v. *Brooks*, 3 Bing. 137; 2 C. & P. C. N. P. 34. And a person having a mere incorporeal right, as of common of pasture, turbary, &c., cannot support trespass *quare clausum fregit* for treading down the grass growing upon the land upon which he has such right of common, &c.; for, although a commoner has a right to take such grass by the mouths of his commonable cattle, he is not to be considered as in possession of the land: *Bro. Trespass*, Pl. 174; *Bac. Ab. tit. Trespass*, C. 9; 3 Burr. 1825; *Cro. El.* 421.

*Proof of the Injury, and that Defendant committed it.*] We have already seen of what nature the injury must be, to maintain this action; viz. that it must be immediate, and committed with force: *ante*, 853. Even shooting at and killing game on another's land, though without an actual entry, is in law, an entry: 11 Mod. 74, 130. And it is immaterial whether the close were enclosed: *Doct. & Stud.* 30; 7 East, 207. We have already seen as to what persons are liable to this action, and what evidence is sufficient to show deft. committed the injury: *ante*, 863-4. If one tenant in common disturb the other in possession, this action may be supported, as if two be tenants in common of a folding, and one of them by force prevent the other from erecting hurdles, &c., *Co. Lit.* 200, b.; but the proper remedy by one joint tenant, or tenant in common, against the other, who commits waste on the land or other property, as by cutting down trees unfit to be cut down, is an action on the case for a misfeasance: 8 T. R. 145; *Com. D. Estate*, K. 8. Though trespass does not lie against a tenant in common for taking the whole profits, yet, if he drive out of the land any of the cattle of the other tenant in common, or hinder him from entering or occupying the land, this action, or an ejectment, may be supported: *Co. Lit.* 199, b.; 3 Wils. 119; 12 Mod. 567.

*Damages.*] These must be proved as stated: as to what may be given in evidence under the *alia enormia*, see *ante*, 865; as to evidence in mitigation, see *ante*, *ib.*

*Evidence under special Plea.*] This must depend on the issue raised: see generally, *ante*, 865; and see the various titles of defences throughout the work.

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\*Evidence for Defendant.

[\*869]

We have already seen what defence may be set up under the general issue, *ante*, 856; and evidence must be adduced accordingly: as to evidence under special plea, see *ante*, 865; and see the various titles of defences in the work, as, "*Accord and Satisfaction*," "*Award*," "*Limitation*," "*License*," "*Common*," "*Way*."

## TROVER.

WHEN THE PROPER FORM OF REMEDY, 869.

FORM OF PLEADINGS, 870.—*Declaration, ib.*—*Plea, 872.*

PRECEDENTS, *ib.*

EVIDENCE FOR PLAINTIFF, 873.—*Proof of his Property in the Chattels, ib.*—*Absolute, ib.*—*Special Property, 877.*—*Plaintiff's Right of Possession, 879.*—*The nature of the Chattels, 880.*—*Their Value, ib.*—*The Conversion, ib.*—*The Conversion by Defendant, 881.*—*The Damages, 887.*

EVIDENCE FOR DEFENDANT, *ib.*

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*When the Proper Form of Remedy.*

TROVER is a form of remedy adopted for the recovery of damages, for an injury occasioned to a person having the property in, or right of possession of, personal property, by a wrongful conversion by deft. of such property to his own use. The foundation of the action is not the acquisition of the property by the deft., but the deprivation of property to the plt.: *per Bayley, J.*, 3 B. & A. 687. The fact of *finding* is an immaterial one, and consequently is not traversable: 1 N. R. 146.

The general requisites to support this action, therefore, are, that the plt. has a *property* in the chattels, as also a *right of possession* over them at the time of conversion, that such chattels should be *personal*, and that deft. has wrongfully *converted* them to his own use. It will be more convenient, perhaps, to consider these requisites more fully when treating of the evidence necessary to support the action: see *post*.

Whenever *trespass* for taking goods will lie, that is where they are taken wrongfully, *trover* will also lie, for one may *qualify*, but not *increase* a tort: *Bishop v. Montague*, Cro. El. 824, *s. c.*; *Shipwick v. Blanchard*, Cro. J. 50, Sir T. Raym. 472; *Cooper v. Chitty*, 1 Burr. 31, *s. p.*; *Put v. Rawsterne*, 4 T. R. 298; in which it was held that trover would lie for goods taken under a *wrongful* distress, but it will not lie for goods *irregularly* sold under a distress, the statute 11 G. 2, c. 19, s. 19, have declared that no person should be considered as a trespasser, *ab initio*, for any thing irregularly done under a distress: *Wallace v. King*, 1 H. Bl. 13. And, if the whole rights and merits of a case have been discussed and determined in one action, the judgment in it may be pleaded in bar to the other, *Lacon v. Barnard*, Cro. Car. 35, *Ferrers v. Arden*, Cro. El. 668, *Lechmere v. Toplady*, 2 Vent. 169; but the converse of the proposition does not hold, for trover may often be brought where trespass cannot: as, where goods are lent or delivered to another to keep, and he refuses to return them on demand, trespass does not lie, but the proper remedy is trover: Sir T. Raym. 472; 2 Ven. 70. So where the taking is lawful, or at least excusable, trespass cannot be supported, but the owner must bring trover; thus, where one G., on the 5th Dec. 1753, obtained judgment against J. and on the same day took out [\*870] execution, and J.'s goods \*were seized under it on the 4th, J. committed an act of bankruptcy, and on the 8th a commission was taken out, and an assignment executed, and afterwards on the 28th

the sheriff sold the goods, it was held the seizing of the goods before the commission and assignment was excusable, and the sheriff was not a trespasser by relation, but the sale, after the commission and assignment, was a conversion, and subjected the sheriff to an action of trover, at the suit of the assignees of J.: *Cooper v. Chitty*, 1 Burr. 25; and see *Smith v. Milles*, 1 T. R. 475. If the plt. should by mistake bring trespass instead of trover, and judgment be given against him for that reason, it seems the deft. cannot plead it in bar to an action of trover, brought afterwards against him: *Ferrers v. Arden*, Cro. El. 668; *Lacon v. Barnard*, Cro. Car. 35; *Lechmere v. Toplady*, 2 Vent. 169, 170; *Put v. Rawsterne*, Sir T. Raym. 472; Gilb. Ev. 266-7; 2 Saund. 47, p.

In some instances, trover and assumpsit are concurrent remedies, see *ante*, 111, 337; though, in general, trover is the preferable remedy, *ante*, 111, 338. As to when trover does not lie for a mere omission or nonfeasance, see *post*, 880. [When the right to maintain this action is not waived by acceptance of part of the converted property, see *Burn v. Morris*, 4 Tyr. 485.]

### *Form of Pleadings.*

*Declaration.*] The venue is transitory: Salk. 290.

The declaration should state that the plt. was possessed of the goods, *as of his own proper goods*; but it has been held that the omission of these words is not material after *verdict*, *Maynard v. Bassett*, Moo. 691, *Jones v. Winckworth*, Hard. 111, *Hudson v. Hudson*, Latch. 214; though not after judgment by default, 2 S. N. P. 1315; and if the plt. has never had *actual possession* of the goods, he need not allege that he was possessed, as where goods of a testator are taken and converted, after his death, and before the executor obtains possession of them, he may declare that the *testator* was possessed of the goods and chattels, and the deft., after his death, converted them without saying that the executor was possessed: *Hudson v. Hudson*, Latch. 214. For a conversion after the death the executor may also declare upon his own possession as executor, *Jenkins v. Plombe*, 6 Mod. 182; but it is not advisable to do so if there be not some good ground for establishing such conversion, as such a count would render the plaintiff liable to costs if he failed: Latch. 214, 220; Cro. Gar. 219; *Bollard v. Spencer*, 7 T. R. 358; *Tattersall v. Groote*, 2 B. & P. 256; 2 Taunt. 116; Com. R. 162. It is not necessary for the plt. to name himself executor, where there has been a conversion after the death: *Eaves v. Mocato*, 1 Salk. 314. If the goods were taken in the testator's life-time, and kept to the time of his death, although not used until after, the executor may declare, of a trover and conversion, during the testator's life-time: *Crosier v. Ogleby*, 1 Str. 60. The assignees of a bankrupt, who have never had actual possession, may declare either on the possession of the bankrupt, or on their own constructive possession; and, in general, it is advisable to insert in the declaration counts in each form, for, where the assignees of two partners, bankrupts, declared on the possession of the bankrupts only, and it appeared in evidence, that the greater part of the goods in question belonged to one of the partners only before the commencement of the partnership, and had never been brought into the partnership fund, and the residue formed part of the joint estate, *Ld. Kenyon, C. J.*, held that

the plts. could recover the residue only; whereas, if there had been a count on the possession of the assignees, as it was a joint commission and the assignment under such commission passes both joint and separate effects, the whole might have been recovered, *Cock v. Tunno*, MS. Selw. N. P. 1316; and there would not be any misjoinder, since the plts. would have described themselves as assignees of both partners in the count, on their own possession, which they might well do, although the [\*871] property was separate, the commission being joint. "However, assignees under a joint commission, when suing for a separate demand, are not obliged to describe themselves as assignees of all the bankrupts: it is sufficient if they describe themselves as assignees of those bankrupts for whose separate demands they sue: *Scott v. Franklin*, 15 East, 428; *Stonehouse v. De Silva*, 3 Camp. 399; *Harvey v. Morgan*, 2 Stark. 17. But, where the commissions are separate, and the same persons appointed assignees under each, although they may declare for a joint demand, due to all or any number of the bankrupts, describing themselves as assignees of those bankrupts, *Scott v. Franklin*, 15 East, 428, *Streetfield v. Halliday*, 3 T. R. 779, yet they cannot declare in the same declaration for separate demands due to each bankrupt, nor for joint demands and also separate demands, *Hancock v. Haywood*, 3 T. R. 433; nor, as it should seem, could they, if the commission were joint, notwithstanding what is thrown out in *Smith v. Goddard*, 3 B. & P. 469; for the assignees are in no better situation than the bankrupts would have been, if solvent, and the bankrupts must, undoubtedly, have brought separate actions. The suggestion of *Ld. Kenyon, C. J.*, as to a second count, in the above case of *Cock v. Tunno*, is not repugnant to this principle, because that count would have been grounded on the property which passed, by the assignment, to the assignees of both the bankrupts, whereas the other cases in this note are grounded on the contracts made by the bankrupts; and, therefore, it necessarily appears by the declaration, that the causes of action are separate, and it is apprehended that, even in *trover* by assignees, a count on the possession of one bankrupt, and another on the possession of the other bankrupt, would be a misjoinder. That the assignees are in the same situation as to joint or separate property that the bankrupts would have been in, is clear from the case of *Jarvis v. Tayleur*, 3 B. & A. 557. Where there are separate commissions against several partners, and different assignees under each commission, in declaring for a joint debt, the assignees must not describe themselves as joint assignees, but as assignees of each bankrupt respectively: *Ray v. Davis*, 2 B. Moo. 3. And assignees, under a joint commission against A. and B., who have committed acts of bankruptcy at different times, cannot recover money received by the debt. during the interval of the acts of bankruptcy, either as money had and received to the use of the bankrupts, or to the use of the assignees: *Hogg v. Bridges*, 2 B. Moo. 122; 2 Saund. 47; see *Butts v. Bitts*, 4 Price, 240. In *trover*, by husband and wife, the declaration ought not to allege the possession within both: *Yelv. 165*.

The chattels should be described with such certainty, that the jury may know what is meant; but the same accuracy and precision are not, it seems, required as in an action of *detinue*, which is for the recovery of things in specie. Hence, a declaration in *trover* for ten pair of curtains and valance, *Taylor v. Wells*, 2 Saund. 74, or for the furniture, apparel,

&c. belonging to a certain ship, *Carth.* 131, has been held good: and see 2 Selw. N. P. 1315. It is not necessary to state the date of a deed, 1 Wils. 116, Bac. Ab. *Trover*, F. 1, B. N. P. 37. What a sufficient description of a lease and release, see 1 Bing. 45, 7 Moo. 304, s. 6; how to describe money, 5 B. & A. 652, 1 D. & R. 282, s. 8. The chattels must be stated to be of some value, sufficient to cover the real value: see 4 B. & A. 271.

The alleged finding is immaterial, the *conversion* being the gist of the action: *ante*, 869. The mode in which deft. made the conversion need not be stated: 2 Bulst. 313; Vid. Ent. 265; 2 S. N. P. 1315. The day alleged of the trover or conversion is quite immaterial, see Cro. J. 428; but some day must be alleged, as also a place as to where the conversion was committed: Cro. El. 78; Salk. 290; Cro. Car. 262. In trover against husband and wife, it is no ground for arresting the judgment or sustaining a writ of error, that the conversion is stated to be by both: *Keigworth v. Hill*, 3 B. & A. It is more correct, however, to state that the wife only converted.

\*The declaration must conclude to the plt.'s *damage*, this be- [\*872] ing an action for damages. In an action by husband and wife, it is improper to conclude, stating that the damage was to both of them: Salk. 114.

*Plea.*] Under the general issue, not guilty, deft. may dispute the plt.'s property in the goods, or his right of possession to them at the time of the alleged conversion, or deny that there was any conversion, or show any ground of defence which proves that the conversion was lawful, or that trover is not maintainable, B. N. P. 48, Sir W. Jones, 240; and see further, *post*. He may show a lien: *ante*, 637. The plt.'s bankruptcy may be given in evidence under the general issue: 7 T. R. 391. The deft.'s bankruptcy cannot be pleaded: *Parker v. Norton*, 6 T. R. 695. A release, it seems, must be specially pleaded: 2 Camp. 558; *sed quære*. The deft. is at liberty to plead any thing which admits the property in the plt. and the conversion, but justifies the latter: 4 Mod. 424; 1 Str. 5; Com. D. *Pleader*, E. 14. The Statute of Limitations should be pleaded specially; 1 Lutw. 99; as to judgment recovered, see *ante*, 610. If trover be brought upon the possession of an intestate, the deft., it is said, cannot give in evidence, upon not guilty, a will and an executor, for it must be pleaded; but, if it be brought upon the possession of *the administrator*, the deft. may take advantage of it in evidence; so, if an executor bring trover upon his testator's possession, he is not bound, upon the general issue, to prove himself executor, but it is otherwise if he declare upon his own possession: 7 Mod. 141; *Blainfield v. March*, per Holt, C. J., s. c.; 2 Ld. Raym. 824; 1 Salk. 285; Holt. 44. That is, if he declare without naming himself executor upon his own *constructive possession*, for, if he were *actually* possessed of the property before it came to the hands of the deft., he need not show his title in order to establish a *prima facie* case. The reason why he need not prove himself executor, where he declares upon his testator's possession, is because he necessarily describes himself as executor, and makes profert of the letters testamentary, which are admitted by the general issue: *Thynne v. Protheroe*, 2 M. & S. 553; *Hunt v. Stevens*, 3 Taunt. 113. As to when assignees of a bankrupt are bound to prove their title under the general issue, *ante*, 206, and *post*, 877.

*Precedents.*

## DECLARATION IN TROVER.

(Commencement as ante, 345; 419.) For that whereas the said plt., heretofore, to wit, on, &c., (any day about the time of conversion,) at, &c., was lawfully possessed, as of his own property, of certain goods and chattels, to wit, 20 tables, 20 chairs, &c. (here specify the goods with sufficient particularity and certainty, in quantity, number, and description: the quality need not be stated. As to the mode of describing deeds, bonds, bills, notes, money, &c., see forms, 2 Chit. Pl. 835,) of great value, to wit, of the value of £—, of lawful money of Great Britain. And, being so possessed thereof, he, the said plt., afterwards, to wit, on the day and year aforesaid, at, &c., aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, came to the possession of the said deft. by finding. Yet the said deft., well knowing the said goods and chattels to be the property of the said plt., and of right to belong and appertain to him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plt. in this behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said plt., although often requested so to do, and hath hitherto wholly refused so to do, and afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, converted and disposed of the said goods and chattels to his own use. To the damage, &c. (Conclude as ante, 419.)

See other precedents in trover, at the suit of assignees of a bankrupt, ante, 206; at the suit of executors, ante, 503.

See plea of general issue, ante, 345.

[\*873]

*\*Evidence for Plaintiff.*

The evidence for plt. will consist in showing: *first*, his property in the chattels at the time of the conversion; *secondly*, his right to possession of them at that time; *thirdly*, the nature of such chattels, and that they are the subject of this form of action; *fourthly*, the value of the chattels; *fifthly*, the conversion by the deft.; and, *lastly*, the damages.

*Proof of PLAINTIFF'S PROPERTY in the Chattels. Absolute Property.* He who has an absolute or general property may support this action, although he has never had the actual possession, for it is a rule of law, that the *property* of personal chattels draws to it the *possession*, so that the owner may bring either trespass or trover, at his election, against any stranger who takes them away: ante, 302; 7 T. R. 9; 1 B. & P. 47. As, where A. is indebted to C., and B. to A., and it is agreed between them, that B. shall give goods in his possession, which were the goods of A., to C., in satisfaction of A.'s debt. If B. converts them, C. may maintain trover against him, although he never had possession, for, by the agreement, the right of property was in him, and the conversion is a wrong to him: B. N. P. 35. So, where an executor declares upon the *possession* of his testator, and of a conversion by the deft., after his death, it is held to be sufficient, because the property is vested in the executor, and that draws after it the possession in law: Latch, 214; 7 T. R. 13; *Gordon v. Harper, per Lawrence J.* In the case of an administrator, it seems the property does not vest until letters of administration be taken out: *Woolley v. Clark*, 5 B. & A. 746; *sed vide* Com. D. *Admin. B.* 10;

8 East, 410. In like manner, a man who has delivered goods to a carrier, or other mere bailee, and so parted with the actual possession, may maintain trover for a conversion by a stranger, for the owner has still possession in law against a wrong-doer, and the carrier or other mere bailee is no more than his servant: *Gordon v. Harper*, 7 T. R. 12; 2 Saund. 47, b. But it is said that, if the bailee, or other person, who has only a special property, sells and *delivers* the goods to another as his own, *bond fide*, and without notice, the general owner cannot maintain this or any other action against the vendee, because, by such a sale, by a person who has a special property in, and possession in fact of the goods, the property of the general owner is altered: Bro. *Trespas*, 216, 295; 2 Saund. 47, b. However, in recent cases, it has been held that, if a bailee of goods, for a particular purpose, transfers them to another, in contravention of that purpose, the general owner may maintain trover against that person, even although he be a *bond fide* vendee, unless in market overt: *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Machin*, 2 Stark. 311; see further, as to the necessity of the plt. having a right to possession, *post*, 879. [See also, *Clerk v. Adam*, 1 Clark & Fin. 242.]

The vendee of goods cannot sue for a conversion of them, unless the absolute property in, as well as the right to possession of them, be vested in him at the time of such conversion: see *ante*, 543, and *post*, as to what is necessary in order to vest this property and right of possession. "If any thing remain to be done on the part of the seller, as between him and the buyer, to ascertain the price, quantity, or individuality of the goods, before the commodity purchased is to be delivered, a complete present right of property does not attach in the buyer, and consequently trover is not maintainable:" S. N. P. 1300, citing *Whitehouse v. Frost*, 12 East, 614; *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 M. & S. 397; *White v. Wilks*, 5 Taunt. 176; 1 Marsh. 2, s. c.; *Shepley v. Davis*, 5 Taunt. 617; 1 Marsh. 252, s. c.; *Withers v. Lys*, 4 Camp. 237; 1 Holt, 18, s. c.; *Hanson v. Meyer*, 6 East, 614; *Fagury v. Furnell*, 2 Camp. 240; *Rugg v. Minett*, 11 East, 210; see, also, *Austen v. Craven*, 4 Taunt. 644; *Mucklow v. Mangles*, 1 Taunt. 318. The vendee must, in general, have paid or tendered the price\* of the goods to entitle [\* 874] him to maintain trover, *Bloxam v. Saunders*, 4 B. & C. 441, 7 D. & R. 896, s. c.; but this may not be necessary in cases where credit is given: *ante*, 543. Where goods are sold upon certain conditions, to be performed at the time of delivery, and the goods are delivered, but the conditions not performed, trover will lie to recover them back: *Bishop v. Skillito*, cited in *Hornblower v. Proud*, 2 B. & A. 329. In the case of a sale of a non-existing chattel, though the purchaser pays the whole price in advance, he acquires no property till it is finished and delivered to him: *Mucklow v. Mangles*, 1 Taunt. 318; *Bishop v. Crawshaw*, 3 B. & C. 419; 5 D. & R. 279; and see 7 B. & C. 26. But, where A. agreed to build a ship for B., and it was part of the contract, that given portions of the price should be paid, according to the progress of the work, it was held, the payment of these instalments, appropriated specifically to B. the very ship in progress, and vested in him a property in that ship: *Woods v. Russell*, 5 B. & A. 942. The unpaid vendor of goods may stop them in transitu, before they come to the hands of the vendor's factor, although such factor has the bill of lading, indorsed to order, in his custody, and is under an acceptance to the vendee on the general account; therefore, where the

vendee became bankrupt, and the factor also, and the messenger, under the commission of the latter, on the arrival of the ship, went on board and seized the cargo, the agent of the vender having previously given notice to the captain to deliver the cargo to him, to which he agreed; it was held, that an action of trover would lie by the vendor against the assignee of the bankrupt's factor: *Patten v. Thompson*, 6 M. & S. 360. If A. sells corn to B., who buys on speculation, and the corn is landed at the warehouse of C. (the granary-keeper of B.,) who is told that he is to hold it on the account of A., A. has a sufficient property in it to maintain trover against C.: *Woodley v. Brown*, 1 C. & P. 593. The lodging a delivery-order with a wharfinger is sufficient to transfer the property in goods lying at a wharf, without any reweighing or rehousing; and, if the party giving the order afterwards become bankrupt, his assignees cannot maintain trover under such circumstances, as for goods in his order and disposition: *Tucker v. Ruston*, 2 C. & P. 86; see 1 Marsh. 358; 5 Taunt. 176. Where a contract was put an end to by both parties, but the goods remained in the possession of the intended purchaser, and upon the price rising, he converted them to his own use, and offered the former price, which the owner refused, and demanded the increased price, and, on refusal, held the debt. to bail "for goods sold and delivered," it was held, that it did not prevent him from suing in trover: *Parry v. Dawson*, 3 Anst. 710.

Trover lies for a ship, where, upon a bargain of exchange, the contract and delivery were fully completed by the payment of earnest: *James v. Price*, Loft, 219. Possession of a ship under a transfer, void for non-compliance with the register-acts, is a sufficient title in trover against a stranger, for parts of the ship being wrecked: *Sutton v. Buck*, 2 Taunt. 302.

Upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract, until either the purchase is finally rescinded by consent, or declared impracticable by a court of equity; and, when the contract is determined, the abstract becomes the property of the vendor; if the sale proceeds, the abstract is the property of the vendee; but an opinion, written there on the seller's paper, by his own consent, continues to be his property: *Roberts v. Wyatt*, 2 Taunt. 268. A sells an estate to B., who pays part of the purchase-money, and the title deeds are deposited with C., to be delivered up to B. when he pays the residue; A. gets possession of them again, and pledges them to D. for a valuable consideration: it was held that B., on tendering the remainder of the purchase-money, is entitled to recover the deeds from D.: *Hooper v. Rambottom*, 1 Marsh.

414; 6 Taunt. 12. A. having agreed to purchase of B. the [\*875] remainder of a term, "the latter delivered to him the lease, in order that he might get an assignment made out: A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or pay the full price agreed on, because B.'s under-tenant had removed some fixtures: it was held that B. might insist on A. accepting the assignment, and, after demand and refusal of the lease, might maintain trover for it: *Parry v. Frame*, 2 B. & P. 451. Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title-deeds, whenever it shall be necessary, and the deeds afterwards come into the vendee's possession on his taking a mortgage of the other part of the estate, and he there assigns the mortgage to a third person, not mentioning the deeds, such third person cannot main-



tain trover against him for the deeds: *Yea v. Field*, 2 T. R. 708. A., having contracted to purchase an estate of B., procured the deeds of conveyance to be prepared at his own expense, and sent them to the latter for execution; when executed, they were delivered to a servant to be returned; but the servant delivered them to C., an attorney, to whom B. was indebted for business done. In consequence of the refusal of other necessary parties to join in the conveyance, A. threw up the contract, and demanded the deeds from C. who refused to deliver them up, until his demand against B. was satisfied: it was held that trover would lie by A. against C. for the deed in a cancelled, if not in an uncanceled, state: *Baile v. Oxenham*, 3 B. & C. 225; 5 D. & R. 49.

A landlord has such a property in timber wrongfully cut down during a lease, as to enable him to support trover, if it be removed: 7 T. R. 13; 1 Saund. 322, n. 5; *ante*, 862. And he may support this action for corn cut by an outgoing tenant after the expiration of his term, though sown by him before that time, under an idea that he was entitled to an away-going crop: *Davies v. Cannop*, 1 Price, 52. Where the owner of a mill demised it to a tenant for a term, and the latter clandestinely, and without permission of his landlord, dismantled the mill of the machinery, which, on its being removed, was seized by the sheriff under a *fi. fa.*, and sold, under his authority, to a *bona fide* purchaser, it was held that the landlord might maintain trover against such a purchaser, though the tenant's term was unexpired: *Farrant v. Thompson*, 2 D. & R. 1 s. c.; 5 B. & A. 826. The church-wardens and overseers of a township leased lands belonging to the poor to the plt. for a term of years, covenanting that it should be lawful for him to take all manure, &c. from the poor-house; and use it upon the demised premises, and the plt. covenanted to provide straw for the use of the poor: it was held, that he could not maintain trover against a succeeding overseer, who used the manure from the poor-house on his own land, even although it arose from the straw supplied by the plt., as the covenant entered into by previous overseers could not bind their successors in office: *Souden v. Emsley*, 3 Stark. 28; and see further; *ante*, 862, and *post*, 878-9, as to actions by landlords. A remainder-man may support this action against a tenant for life, for taking away trees: *Com. D. Biens, H.*; 1 T. R. 55. A tenant in tail, after possibility of issue extinct, is entitled to timber, when cut: *Williams v. Williams*, 12 East, 209. Trustees of an estate, *pour autre vie*, cannot sue in trover for trees felled upon the estate: *Baker v. Ancombe*, 1 N. R. 25.

A tenant, after having annexed a personal chattel to a freehold, cannot, in general, afterwards take it away: 3 East, 38; *Buckland v. Buckland*, 4 Moo. 440; 2 B. & B. 58, s. c. But there are exceptions to this rule, made in favour of trade, and for the purposes of agriculture, &c.: see *Ehves v. Maw*, 3 East, 38; 2 Saund. 259. However, whatever things, annexed to the freehold, are removable, in favour of trade or otherwise, they must be severed during the possession of the party entitled, which severance may be made even after the expiration of his interest, if he have not quitted possession, *Fenton v. Robart*, 2 East, 88; but if he quit the premises, leaving the fixtures annexed to the freehold, he cannot sue in trover for them: *Horn v. Baker*, 9 [876] East, 215; *Davis v. Jones*, 2 B. & A. 165; *Colegrave v. Dias Santos*, 2 B. & C. 76; *Lee v. Risdon*, 7 Taunt. 188; 2 Marsh. 495, s. c.

[The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade; and the jury found that it was not removed within a reasonable time after the entry of the lessor: Held, that they had no right so to remove it, and that the lessor might recover in trover. And it seems, such would be the case even without such finding of the jury: *Wetton v. Woodcock*, 7 Mees. & Welsby, 14.] As to what are such fixtures, see *ib.*, 4 Moo. 381, 440; 2 Stark. 403. A tenant has a right to matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscots fixed by screws, or the like: 1 Plow. 94; 1 Atk. 477; 3 Atk. 13.

The property of goods passes by indorsement and delivery of the bill of lading by the consignee to another, *bona fide*, for a valuable consideration, and without collusion with the consignee, although the indorsee knew at the time that the consignor had not received payment in money for his goods, but had taken the consignee's acceptance, payable at a future day, not then arrived: *Arming v. Brown*, 9 East, 506; and see 2 Bing. 260.

A calico-printer is entitled, after having discharged his head colourman, to the book in which that servant has entered the processes for mixing colours during his service, although many of the processes were the invention of the head colourman himself: *Makepeace v. Jackson*, 4 Taunt. 770.

A party who purchases goods, under a distress irregularly conducted, has a sufficient title to maintain trover: *Lyon v. Wedon*, 3 Bing. 344. If a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer: *Shipwick v. Blanchard*, 6 T. R. 298. A landlord who distrains goods has not such a property in them as will enable him to maintain this action: *Meneaux v. Goreham*, S. N. P. 1303.

A verbal gift of a chattel, without actual delivery to him or his agent, does not pass the property to the donee: *Irons v. Smallpiece*, 2 B. & A. 551; 2 Saund. 47, *a. nota*. Property in goods will not pass by an award: *Hunter v. Rice*, 15 East, 100. Trover does not lie for the conversion of a record, which is not private property; but it does for a copy of a record: *Hard*. 111. The obtaining goods upon *false pretences*, under colour of purchasing them, or by any other wrongful means, does not change the property: *Noble v. Adams*, 7 Taunt. 59; 2 Marsh. 366, *s. c.*; *Com. D. Biers, E.* And, by a fraudulent sale or transfer, no property passes: *Wilkinson v. King*, 2 Camp. 335. Where a foreign merchant consigned goods to his correspondent in London, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt, it was held that the factor was liable to the foreign merchant in trover for the goods: *Duclos v. Ryland*, 5 Moo. 518, *n.* A party cannot sue in trover for the detention of papers which he had deposited with deft. in furtherance of a fraudulent or illegal purpose: 2 Bing. 314.

The general Pawnbrokers' Act, 39 and 40 G. 3, c. 99, s. 17, declares, that goods which are pledged, and not redeemed within a year after the day of pledging, shall be forfeited, and may be sold by the pawnbroker; it has been held that, where the plt. had pawned a watch, and, after the year had expired, tendered the money lent, and interest, to the pawnbroker, and he refused to deliver it up, the plt. might maintain trover, not having forfeited his title to the goods, by reason of the 17th section of that statute: *Water v. Smith*, 1 D. & R. 1, s. c.; 5 R. & A. 439.

With respect to stolen goods, if a party has good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, unless he has done every thing in his power to bring the thief to justice, *Grimson v. Woodfall*, 2 C. & P. 41; Lofft, 601; and even then he cannot recover the value of them in trover from the person who purchased them in *market overt*, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession: *Horwood v. Smith*, 2 T. R. 750; 2 Camp. 335; 2 Stark. 311; 2 B. & N. 329, n. With respect to stolen horses, the property is not altered by a sale in *\*market* [\*877] *overt*, unless the provisions of 2 P. & M. c. 7, and 31 El. c. 12, (see the 7 & 8 G. 4, c. 29,) are complied with. The regulations are, in substance, as follows: first, the horse must be exposed openly, in the place used for sales, for one whole hour, between ten in the morning and sunset, and afterwards brought by both vendor and vendee, to the book-keeper of the fair or market; secondly, toll must be paid, if any due, and, if not one penny to the book-keeper, who shall enter the price, colour, and marks of the horse with names, additions, and abode of the vendor and vendee; and, if the vendor is not known to the book-keeper, the vendor shall bring one credible witness to avouch his knowledge of the vendor, whose name in like manner is to be entered. The property of the owner is not to be taken away by such sale, if within six months after the horse is stolen, he puts in his claim before some magistrate where the horse is found, and, within forty days more, proves such property by the oath of two witnesses, and tenders to the person in possession of the horse such price as he, *bona fide*, paid for it in market overt.

When goods stolen are *pawned*, the owner may maintain trover against the pawnbroker: *Packer v. Gillies*, 2 Camp. 336, n. And, if one employed to sell goods by commission pawns them, the owners of the goods may maintain trover against the pawnbroker after a demand and refusal, although the duplicate has not been tendered, according to the stat. 39 & 40 G. 3, c. 99, s. 5; *Peet v. Baxter*, 1 Stark. 472. Trover lies at the suit of the pawnbroker, for plate which he had taken from a man, who at the time, produced a receipt for the price which he had obtained, by fraudulently giving a draft, which was of no value, where the thief was indicted by the person from whom he obtained the goods, by the pawnbroker, upon which the deft. took and detained the plate, the court saying that the case was not within the statute of 1 Jac. 1, c. 21, s. 5, which enacts, that the sale of any goods, wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property: *Davis v. Morrison*, Lofft, 185.

As to what property a *bankrupt* or *insolvent* has over goods, to entitle him to sue, see *ante*, 863.

Assignees of a bankrupt may bring trover for a conversion, previous to

or after the bankruptcy: 3 East, 407; Holt, C. N. P. 172. If the action be for a conversion *before* the act of bankruptcy, they must give evidence of their title to sue, by proving the bankruptcy and themselves assignees; but, when the conversion is *after* the bankruptcy, they need not declare in their representative capacity: consequently, they need not enter into proofs of their title, though it is otherwise if they name themselves as assignees, even *after* bankruptcy: 2 Cowp. 570; Starv. Ev. v. 2, p. 141. And, where assignees, under a joint commission against A. and B., bring an action on the part of A. only, proof of the joint commission is sufficient to enable them to recover: 2 Stark. 17; and see *ante*, 199, 202, 206; and as to executors, see *ante*, 496.

An executor may support trover against a person who takes the goods of his testator during his life, though the conversion does not take place till after the testator's death, 1 Str. 60, in which case he may declare either on his own possession, or on that of his testator; though it is a general rule that, whether the conversion were before or after the testator's death, if the sum sought to be recovered would be assets, then the executor must declare in his representative capacity; and, if he fail, he would not, in that case, be liable to pay costs, 4 T. R. 281: whereas, if he declare otherwise, and fail, the payment of the costs would fall upon him: Salk. 207, cited in 4 T. R. 278. An executor *de son tort* may support trover, 1 Chit. Pl. 51; as to proving his being executor, *ante*, 508.

*Special Property.*] Proof by plt. of his having a special property in the goods will suffice to enable him to maintain this action. Thus a carrier may maintain trover against a stranger who takes the [\*878] goods out of \*his possession: 1 Roll. Ab. 4, (l.) pl. 1; *Arnold v. Jefferson*, 1 Ld. Raym. 276; B. N. P. 33. So may a factor, or other consignee, or pawnee, or trustee. So, if a house be blown down, and a stranger take away the timber, the lessee for life may bring trover, for he has a special property to make use of it for the purpose of rebuilding, although the general property is in the owner: B. N. P. 33. So, the lord of a manor may, before the expiration of a year and a day, and even before seizure, bring trover against a stranger who takes away an estray from off his manor: *ib.* So, if a man lend his cattle to J. S., to plough his land, and a stranger takes them away, J. S. may maintain trover or trespass against him: Bro. *Trespas*, 92. The agister of cattle may also maintain trover against a stranger who takes them away: *ib.* 57. A person who has a temporary property in goods, delivering them to the general owner, for a special purpose, may, after that purpose is answered, upon a demand and refusal, maintain trover for them: *Roberts v. Wyatt*, 2 Taunt. 268. Possession under a general bailment is sufficient, *Burton v. Hughes*, 6 Moo. 334, 2 Bing. 173, 2 Taunt. 302; so is possession under a gratuitous bailment: 1 B. & A. 39. So, churchwardens may bring trover for the goods of the church taken away, either in their own time, or in that of their predecessors, for the churchwardens of the preceding year cannot maintain an action after the expiration of their year: 11 H. 4, 12, a.; Com. D. *Eglise*, (F. 3.); F. N. B. 208, K., 7th ed.; Bro. *Garden D'Eglise*, 4, 6, 7; *Attorney-General v. Ruper*, 2 P. Will. 126; *Dent v. Prudence*, 2 Str. 852. A sheriff has such a special property in goods taken by him under a *fi. fa.*, as to enable him to maintain trover against a wrong-doer, 2 Saund. 47, 1 Vent. 52, 6 Mod. 292; but a landlord has

not a sufficient property in goods distrained by him to enable him to sue in trover for them: *ante*, 876. A mere servant cannot support this action: Owen, 52; 1 Camp. 369. Where a colonel had purchased horses for government; and they being approved of by the proper inspecting officer, were sent, under the care of a sergeant, to the receiving depot for his majesty's use, it was held that the colonel had not such a special property as to maintain trover for one of them which was taken out of the possession of the sergeant, as a distress for a turnpike-toll: *Hopkinson v. Gibson*, 2 Smith. 205-6.

A person who has only a *special property* may, in some cases, maintain trover, although he has never had *actual possession*: *Fowler v. Down*, 1 B. & P. 44. Thus, a factor, to whom goods have been consigned, but which he has never received, may bring this action: *ib.* Where A. shipped goods at Dundee, by the order of and for B., in London, and shortly after the shipment, A. ascertained that B. had stopped payment, and he then inclosed and forwarded the bill of lading to the plt. in London, directing him to take possession of the goods, and he demanded them from the defts., who were wharfingers, and in whose custody they were, it was held, on their refusal to deliver over the goods to the plt., that he had a sufficient title to sue for them in trover: *Morrison v. Gray*, 2 Bing. 260. Where the owner of furniture lent it to the plt., under the terms of a written agreement, and he placed it in a house occupied by the wife of B., who afterwards became bankrupt, his assignees having seized the furniture, it was held, that the plt. might recover in trover, without producing the agreement: *Burton v. Hughes*, 2 Bing. 173.

*Possession*, with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action against a wrong-doer, for possession is *prima facie* evidence of property; *Blackham's case*, 1 Salk. 290. As, in trover for certain loads of wood, the case was, that Sir T. P., having a large wood, sold to one C. and his assigns as many trees as would make 600 cords of wood, to be taken by the assignment of Sir T.—C. assigned over his interest to the plt.; afterwards, Sir T. granted to the deft. so much of his wood as would make 4000 cords, to be taken at the deft.'s election; afterwards, the plt., by the assignment of Sir T., cut down the trees in question, to make 600 cords, and the deft., \*claiming them by virtue of his grant, [\*879] took them, and it was found that there was sufficient wood left for the deft.: it was held that the action was maintainable, because, by cutting down the trees, the plt. had possession and a good title against the deft. and every stranger, and, being cut down, the deft. could not lawfully take them: and, even supposing, the plt. had not a good title, yet *having possession*, of the trees was sufficient: *Basset v. Maynard*, Cro. Eliz. 819, s. c., 5 Rep. 24, b.; Moo. 691, 692; and see 2 Str. 777. So, where the plt. bought a vessel, which was stranded, but she was not conveyed to him, according to the provisions of the register acts, the plt. took possession of her, and for some days endeavoured to save her, but afterwards she went to pieces, and parts of the wreck drifted upon the deft.'s premises, and were by him cut up and carted away, it was held that there was enough property in the plt. to enable him to main trover: *Sutton v. Buck*, 2 Taunt. 302. There may also be a special property arising simply out of a lawful possession, but which ceases when the true owner appears: as where the plt.'s being a chimney sweeper's boy, found

a jewel, and carried it to the shop of deft., who was a goldsmith, to know what it was, and delivered it into the hands of his apprentice, who, under pretence of weighing it, took out the stones, and called to the master, to let him know it came to three halfpence: and the master offered the boy the money, but he refused to take it, and insisted on having the thing again, whereupon the apprentice delivered him back the socket, without the stones; in trover against the master, it was ruled, 1. That though the finder of a jewel does not acquire an absolute property, yet he has such a property as will enable him to keep it, against all but the rightful owner; and, consequently, he may maintain trover; 2. That the action will lie against the master, who gave a credit to his apprentice, and is answerable for his neglect: *Armory v. Delamirie*, 1 Str. 505.

The action may, in most cases, be brought either by the general or special owner of the goods for a conversion thereof by a stranger, and judgment obtained by one is a good bar to the action of the other: Bro. Tres. 67; 2 Rol. Abr. 569. (P.)

*Proof of the Plaintiff's Right of Possession.*] The plt. must establish his *right of possession*, as well as of property, to support this action; therefore, where a man let a house and furniture for a term, and the furniture was wrongfully taken in execution pending the term, it was holden that the lessor could not maintain trover, because, during the term, he had parted with the right of possession: *Gordon v. Harper*, 7 T. R. 9; and see 2 Esp. Rep. 465; *Benjamin v. Bank of England*, 3 Camp. 417; *Bloxum v. Saunders*, 4 B. & C. 941, 7 D. & R. 896, s. c.; *ante*, 875. Where goods, lent on hire, have been wrongfully taken in execution by the sheriff, under a writ of *fi. fa.*, the owner cannot maintain trover against him, he not having the right of possession, as well as the right of property, at the time of the sale: *Pain v. Sheriff of Middlesex*, R. & M. 99. But, where the person to whom the goods were left was a married woman, living separate from her husband, and therefore unable to gain any property in them, it was held that such a bailment did not deprive the real owner of his action of trover: *Smith v. Plomer*, K. B., 52 Geo. 3, cited in Pea. Ev. 4 Ed. 342. And, where A. had sold goods to B., and B. had paid for them, and afterwards, before delivery to B., C. became possessed of the goods, and, on being informed of the circumstances, declared, that he would not deliver them to any person whatsoever, it was held that A., having repaid B., might maintain trover against C. without any further proof of conversion, for the contract between A. and B. was rescinded, and A. remitted to his former right, *Pattison v. Robinson*, 5 M. & S. 105; and although, where goods are let for a term of years, the lessor cannot maintain trover for them during the term, yet if trees, or other things fixed and annexed to the freehold, and demised [\*880] therewith, be severed during the term, they immediately \*become vested in the owner of the inheritance; and he may maintain trover for them: *Farrant v. Thompson*, 5 B. & A. 826; see *ante*, 875.

*Proof of the Nature of the Chattels.*] It must be proved, that the chattels, in respect of which the action is brought, are *personal*, for the action does not lie for things annexed to the freehold, nor for any injury to real property, Cro. J., 129, B. N. P. 44; Bac. Ab. *Trover*, B. As to

where trover lies for *fixtures*, see *ante*, 875. It is only sustainable for specific articles; therefore, it does not lie for goods sold to a party, but not set apart by the vendor: 4 Taunt. 648. It lies for money, though not in a bag, or otherwise distinguishable from other coin, because the thing itself is not to be recovered in this action, but merely damages for the conversion: Vin. Ab. *Trover, K.*; Bac. Ab. *Trover, D.*; 4 Taunt. 24. It lies for an unstamped agreement, if it can, upon payment of a penalty and stamp-duty, be stamped, and rendered available: *Scott v. Jones*, 4 Taunt. 865. So it will lie for a policy of insurance, by the insured, if wrongfully withheld, either by the broker employed by him to effect it, or by any other person into whose hands it may happen to come: *Harding v. Carter*, 1 Park. Ins. 4. It will lie for an undivided part of a chattel, as three-fourths of a ship, &c.; *Watson v. King*, 4 Camp. 272.

The chattels must be proved as described in the declaration. Thus, in trover for a debenture, the plt. must prove the number of the debenture, and the exact sum, to a farthing, as stated in the declaration, though unnecessarily so, *ante*, 870, or he would be nonsuited: B. N. P. 37. In trover for a bond, the plt. will be permitted to give parol evidence of its contents, though he has not given the deft. notice to produce the instrument itself: *Wilson v. Chambers*, Cro. Car. 262. So, in trover for the certificate of a ship's registry, the certificate may be proved to have been granted to the plt. by the production of the registry from which it was copied, though no notice has been given to deft. to produce the certificate itself, *Butcher v. Jarrat*, 3 B. & P. 143; for, in these cases, the nature of the action is a sufficient notice to the deft. of the subject of inquiry: 2 S. N. P. 1324; and see *Hammond v. Plank*, Pea. Rep. 166, n.

*Proof of the Value of the Chattels.*] This being an action for damages, the value of the chattels converted by deft. must be established by some competent party. If the chattels have been sold by deft., and fetched their full value, such sale should be proved: see further, *post*, as to damages.

*Proof of Conversion.*] A conversion may arise, either by a wrongful taking of the chattel, or by some other illegal assumption of ownership, or by illegal using or misusing it, or by a wrongful detention, 1 Chit. Pl. 140-1. The mode in which the deft. obtained the chattel is in general material to be attended to in framing the evidence, to establish a conversion, but the alleged fact of the finding need not be attended to, if deft. did not become possessed of the chattel by finding: 1 N. R. 140. A mere omission or nonfeasance will not in general, amount to a conversion: 6 East, 540; 2 B. & A. 704. As when goods are delivered under a contract to do something with them, and to deliver them according to the party's undertaking, an omission of the party's doing what he so undertook to do, will not sustain an action of trover, unless there has been an actual refusal to redeliver: *Severin v. Keppel*, 4 Esp. Rep. 156. If a carrier, or other bailee, by negligence, lose goods entrusted to his care, the remedy, in general, must be in case or assumpsit: 5 Burr. 2825; 2 Saund. 417, c. An agent selling at an under-price is not liable in trover: 3 Saund. 117. Where the servant of the deft., a coach-spring-maker, received a spring of the plt. to repair, and promised to bring it back by a certain hour, the deft. after that, \*refused to return it, without [\*881] being first paid for the repair; it was held not to be a sufficient

conversion to support trover, as the action, if any, should have been special assumpsit: *Fairman v. Grimble*, 2 C. & P. 266. The plt. exchanged a watch with the deft., for a pair of candlesticks, which the latter warranted to be silver: it was held that the plt. could not maintain trover for the watch, on proof that the candlesticks were of base metal: *Emanuel v. Dane*, 3 Camp. 299: and see *ib.* 352.

However temporary the conversion may have been, it will suffice to render the deft. liable; for a conversion, which has once taken place, cannot be cured: therefore, if A. take B.'s horse, and ride him, and afterwards deliver him to B., yet trover will lie, and the redelivery will go only in mitigation of damages: *Countess of Rutland's case*, 1 Roll. Abr. 5, (l), pl. 1; *Wyatt v. Blades*, 3 Camp. 396; and see 3 B. & A. 687.

*Conversion by a Wrongful Taking.*] Proof of the direct wrongful taking of the chattels is of itself evidence of a conversion, and wherever trespass will lie for the taking of goods, so will trover: *ante*, 863; 3 Wils. 33; Willes, 55; 2 Saund. 47; B. N. P. 44. Where a bankrupt was required by his assignees, on his last examination, to deliver to them his books of account, which he did, it was held that he must be deemed to have delivered them on compulsion; and, it being afterwards found that he was not a trader, and that the commission had improperly issued, that he might support an action of trover against such assignees, without any previous demand of the books: *Summerset v. Jarvis*, 6 Moo. 56, s. c.; 3 B. & B. 2. A seizure of goods, under a *fi. fa.* after a party's bankruptcy, and a removal of them to a broker's, is a sufficient conversion: 3 Camp. 396. If goods be obtained by fraud, or in any other illegal manner, this action will be maintainable, without proof of a demand and refusal, 7 Taunt. 59, 1 B. & C. 514; and the action may be supported, after an acquittal of the deft. for a felonious taking of chattels: 12 East, 409. The intent of the party taking the goods is immaterial: for, although the deft. acted under a supposition that he was justified in what he did, he will be equally liable to this action: 4 M. & S. 260. But, where an injury has been done to a chattel belonging to another, in endeavouring to do a service to such person out of charity, or to prevent mischief from the act of other persons, an action of trover will not lie for it: *Drake v. Shorter*, 4 Esp. Rep. 165. It is no conversion, if the master of a ship throw goods into the sea, to prevent the ship from sinking: *Bird v. Astcock*, 2 Bulstr. 280. Trover does not lie for the taking of too many goods, under a regular execution, 2 C. & P. 146; and the retention of property, under a decree of a court of a competent jurisdiction, is no conversion: 4 Moo. 361. Trover will not lie for goods irregularly sold under a distress for rent, since the stat. 11 G. 2. c. 19, s. 19: *Wallace v. King*, 1 H. Bl. 13; 5 B. & A. But an irregularity in a distress taken *damage feasant*, may amount to a conversion, and be the subject of an action of trover: Cro. J. 148; Bac. Ab. *Trover*, B. And, if goods be wrongfully seized, though they be not removed from the place in which they were, yet trover lies, because the possession, in point of law, is changed by their being seized as a distress: Willes, 56.

*Conversion by wrongful Assumption of the Property.*] If a party claim the property in the chattels as his own, or even assert the right of another over them, it will be evidence of a conversion: as, where it was



found that a bankrupt, being indebted to G., delivered goods to G.'s servant, who gave a receipt for them in his master's name, and sold them for his master's use, the court determined that the sale, whether for the use of the seller or another, was a conversion; for, where a person takes upon himself to dispose of another's property, it is a tortious act, and the gist of the action, *Perkins v. Smith*, 1 Wils. 328, *Parker v. Godin*,\* 2 Str. 813, *s.p.*; and, accordingly, in *Stephens v. Elwall*, [\*882] 4 M. & S. 529, it was held, that a servant may be charged in trover, though the conversion be done by him for the benefit of his master. So, where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done, under a pretended usage to do so, a demand and refusal being proved, it was held by *Holt, C. J.*, that the denial of goods to him who has a right to demand them, is an *actual conversion*, and not evidence of it only, for what is a conversion but an assuming upon one's self the property in, and right of disposing of, another's goods? and whoever detains another man's goods without cause, takes upon himself the right of disposing of them: *Baldwin v. Cole*, 6 Mod. 212. So, where a man, entrusted with the goods of another, puts them into the hands of a third person, without orders, it is a conversion; as, where the owner of goods on board a vessel directed the captain not to land them on a wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea that the wharfinger had a lien on them for the wharfage fees, because the vessel was unloaded against the wharf, it was held that the owner, upon demand and refusal, might maintain trover against the captain, unless he could establish the wharfinger's right; for putting the goods into the custody of the wharfinger brings a charge upon the plt., and is, therefore, a conversion by the deft.: *Syeds v. Hay*, 4 T. R. 260. Where, however, the deft., who had been entrusted by the plt. to sell certain goods in India, not being able to sell them there himself, delivered them to an agent in India, to be disposed of by him, it was held no conversion: *Bromley v. Coxwell*, 2 B. & P. 438. And, where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defts., who thereupon accepted a bill for him, and he at the same time directed the defts. to sell the goods and reimburse themselves the amount of the bill out of the proceeds, it was held that the defts., having sold the goods, could not be sued for them in trover by the original owner: *Stiernhold v. Holden*, 4 B. & C. 5; 6 D. & R. 17, *s. c.* Where A. consigned the goods of B. to C., and C., without notice of the right of B., sold a part and kept the remainder in his possession, the sale was held to be a conversion: *Featherstonehaugh v. Johnstone*, 8 Taunt. 237; 2 Moo. 181. If a man, against the owner's consent, make use of a thing found or delivered to him, it is a conversion, Cro. El. 219, 3 B. & A. 687; as, if a carrier draw out part of a vessel, and fill it with water, it is a conversion of all the liquor, *Richardson v. Atkinson*, 1 Str. 576; or, if a carrier or wharfinger break open a box containing goods, or sell them: 2 Salk. 855. If a person, coming to the possession of land, find chattels there, and remove them to a great distance, it is a conversion: *Fordsdick v. Collins*, 1 Stark. 173; 4 T. R. 364. Trover will lie against a carrier who delivers goods to a wrong person, though by mistake, *Youl v. Hardbottle*, Peake's N. P. C. 68; or against a warehouseman under the same circumstances,

*Devereux v. Barclay*, 2 B. & A. 702; or where he delivers them upon a forged order: *Lubbock v. Inglis*, 1 Stark. 104. However, for a bare non-delivery it will not lie, *per* *Ld. Ellenb., C. J.*, in *Severin v. Keppell*, 4 Esp. Rep. 157, *ante*, 325, 880, unless the goods be in the possession of the deft., and he refuses to deliver them on demand: *Dewell v. Moxon*, 1 Taunt. 391. It has also been held, that not only claiming property as *one's own*, but asserting the right of *another* over it, is, upon demand and refusal, sufficient evidence of a conversion: 2 Saund. 47, *f.* So, where the vendor of a quantity of tin shipped the same on board a ship bound to Leghorn, by the orders of the vendee, the captain, by his bill of lading, undertook to deliver the tin to an individual at Leghorn, the tin being heavy was placed at the bottom of the hold, with other goods over it; the vendee having become bankrupt, the vendor required the captain to deliver up the tin, but did not tender the freight, or offer to make any [\*883] compensation to him for the trouble of unloading the vessel, the captain refused, alleging that he had signed a bill of lading to deliver the tin to another person; held, that this was sufficient evidence of a conversion: 6 B. & C. 36; 2 C. & P. 334, *s. c.* But there would not have been sufficient evidence of a conversion in the last mentioned case, had the captain, in his refusal, stated that he could not get at the goods: *ib.* 37. Taking the property of another by assignment from one who had no authority to dispose of it, as taking an assignment of tobacco in the king's warehouse by way of pledge, from a broker who had purchased it there in his own name for his principal, and refusing to deliver it to the principal after notice and demand by him, none other than the person in whose name it is warehoused being able to take it out, is a conversion: *McCombie v. Davies*, 6 East, 538. If a party possess himself of a stolen bill or note improperly, a demand and refusal are not necessary previous to an action of trover brought for its recovery by the loser: *Beckwith v. Corral*, 2 Bing. 444; 2 C. & P. 261. The discounting a lost bill after notice is a conversion: 4 Taunt. 799. The taking of a bill of exchange from a bankrupt, after an act of bankruptcy, and under circumstances in contravention of the bankrupt laws, is of itself a conversion: *ante*, 200; 1 Esp. Rep. 50. A sale of a ship, which was afterwards lost at sea, made by the deft., who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without showing a demand and refusal: *Bloxam v. Hubbard*, 5 East, 407. And, in general, in trover by the assignee of a bankrupt, to recover property in his order and disposition at the time of the act of bankruptcy, no demand and refusal are necessary: *Soames v. Watts*, 1 C. & P. 400. But the assignees cannot bring trover, without a demand and refusal, for goods collusively sold by a bankrupt on the eve of his bankruptcy, for the parties contracting were competent at the time; and, if the assignees disaffirm the contract, they should give notice by a demand: *Nixon v. Jenkins*, 1 H. Bl. 135; and see, further, *Lovill v. Martin*, 4 Taunt. 799. A party having a lien on goods will be guilty of a conversion, if he claim the detention of them on another ground than on the right of lien, see *ante*, 641; but a mere assertion will not, in general, constitute a conversion; as where a carrier asserted he had delivered the goods to the consignee, which assertion was false, it was held not evidence of a conversion: *Attersall v. Briant*, 1 Camp. 409. And proof that the deft. in trover stated that he sold the property in question

on the plt.'s account, is not *prima facie*, evidence of a conversion: *English v. Charters*, 2 Stark. 30. But, where the captain of a vessel, on application for a delivery of goods, said he had signed a bill of lading to deliver the goods to another, this was held a conversion: *Thompson v. Trail*, 6 B. & C. 36; 2 C. & P. 334, *s. c.*; *post*, 886. In trover by one joint-tenant, tenant in common, or parcener, against his companion, evidence of the destruction of the chattel must be adduced: see *post*, 886.

*Conversion by Demand and Refusal.*] Where the chattels came into the deft.'s possession by delivery or finding, the plt. must demand them, and the deft. refused to deliver them up, in order to constitute a conversion, 1 Sid. 264, *Bowen v. Roe*, B. N. P. 44; and, in all cases where the plt. is not prepared to prove a wrongful taking or assumption of property by the deft., he must prove such demand and refusal: 2 H. Bl. 135. Where a trader on the eve of bankruptcy, makes a collusive sale of his goods to A., the assignees cannot maintain trover for them, without proving a demand and refusal: *Nixon v. Jenkins*, 2 H. Bl. 135.

A demand in writing, left at the deft.'s house, is sufficient in trover: *Logan v. Houlditch*, 1 Esp. Rep. 22; 1 Gow, 69; *post*, 884. If a verbal demand and demand in writing are made at the same time, for the purpose \*of bringing an action of trover, and the one [\*884] have no reference to the other, evidence of the verbal demand is sufficient, without the production of the writing: *Smith v. Young*, 1 Camp. 439. A demand of payment for goods, for which an action for trover is brought, is a good demand to support the action: *Thompson v. Shirley*, 1 Esp. Rep. 31. A demand of fixtures is not a sufficient demand of articles not fixtures: *Colegrave v. Dias Santos*, 2 B. & C. 76; 3 D. & R. 255, *s. c.* If the demand be made by a third person on the plt.'s behalf, he must be proved to have been duly authorized to make it: see *ante*, 731-3.

The refusal must be positive and absolute, and not merely evasive: *Severin v. Keppell*, 4 Esp. 157. Where the servant of a company refused to deliver the plt.'s goods, which were in one of their warehouses, of which he kept the key, without an order from the company, this refusal was held not to be sufficiently absolute to constitute a conversion: *Alexander v. Southey*, 5 B. & A. 247; and see 6 B. & C. 36; 2 C. & P. 334, *s. c.*; *ante*, 883. If A. finds the goods of B., and, upon a demand of the goods, answers that he knows not whether B. be the true owner, and therefore refuses to deliver them, this is not evidence of a conversion, if A. keep them for the true owner: *Isaac v. Clarke*, per Coke, C. J., 2 Bulst. 312; *Green v. Dunn*, 3 Camp. 215, *n. s. p.*, per Ld. Ellenb. C. J. Where, in an action of trover, the demand of the goods is not made by the party himself, a refusal, on the ground that the party applying is unknown or not properly authorized, is not sufficient to support the action: *Solomons v. Davies*, 1 Esp. Rep. 63. In trover for a landau, proof of a demand of the landau, left at the deft.'s house, and nondelivery in pursuance of it, may be evidence of a conversion, without an absolute refusal: *Walkins Worlly*, 1 Gow, 69. Where plts. sold goods to T., who paid for them, and was to take them away, but deft. becoming possessed of the place in which the goods were deposited, plt.'s attorney, accompanied by T., demanded them of deft., telling him that they belonged to plts., and that they had sold them to T., to which deft. answered, that he would not de-

liver them to any person whatsoever, and afterwards plts. repaid the money to T., and brought trover against deft., it was held that this demand and refusal were sufficient evidence of a conversion to support the action, and that a new demand by the plts., after they had repaid the money to T., was not necessary: *Pattison v. Robin*, 5 M. & S. 105.

Where a party at the time of refusal, has it not in his power to deliver up the goods, the refusal is no evidence of a conversion, as where he had deposited a lease with his attorney, who he said had a lien on it: *Smith v. Young*, 1 Camp. 439.

A demand and refusal may be evidence of a prior conversion; and, where an attorney had been possessed of certain deeds of the plt. for a considerable time prior to Michaelmas term, and a demand and refusal on the 29th of Nov. were proved, the court held it evidence of a conversion prior to Michaelmas term: *Wilton v. Girdlestone*, 5 B. & A. 847; 1 D. & R. 488, s. c.

A demand and refusal are only *prima facie* evidence of a conversion, 10 Rep. 56, b. 57, *Miles v. Solebay*, 2 Mod. 244, 1 N. B. P. 44; and a demand and refusal are no evidence of a conversion, where it is apparent that the deft. has made no conversion, as where the deft. cut down trees and left them lying in the place where they were felled, for he cannot be said to have converted the trees, if they continue there, as before: *Miles v. Solebay*, 2 Mod. 244; B. N. P. 44. So, a demand and refusal are no evidence of a conversion in the case of a carrier or wharfinger, where the deft. proves the goods to have been lost through negligence, or stolen, and, therefore, trover does not lie, though the owner may have an action upon the case, 1 Vent. 223, *Owen v. Lewyn*, 2 Stalk. 655, Anon., 5 Burr. 282-5, *Ross v. Johnson*: nor where it appears that the carrier or wharfinger detained, because the plt. refuse to pay for the carriage or wharfage of them, *Skinner v. \*Upshaw*, 2 Ld. Raym. 752, *York v. Greenaugh*, *ib.* 866; and therefore, if the person in whose possession the goods are, has a lien upon them for a debt due to him from the owner, the plt. must prove that he paid, or tendered, the money before the bringing of the action, for otherwise the deft. will have a right to detain the goods: *Robinson v. Waller*, see 3 Bulst. 269: *York v. Grindstone*, 1 Salk. 388; 2 Show. 161; Anon., 2 Rol. Ab. 92, (M.) pl., 6; *Chapman v. Allen*, Cro. Car. 271: B. N. P. 45. *Gray v. Chamberlain*, 4 C. & P. 260. But, if one, having a lien upon the goods when they are demanded of him, claim to retain them upon a different ground, making no mention of the lien, trover may be maintained against him, without evidence of any tender having been made of the amount of his lien: *Boardman v. Sill*, 1 Camp. 410, n.; *ante*, 641. Trover lies for a dog that was lost, and which the deft. refused to deliver, unless paid for his keeping: *Binstead v. Buck*, 3 W. Bl. R. 1117.

*Proof of CONVERSION BY DEFENDANT.*] This must be satisfactorily established. The observations already made, as to what will amount to a conversion, will, for the most part, here apply. We have already seen that all persons who direct or assist in the committing an injury to the property of another, are liable as principals: *ante*, 350, 863. Thus, a servant, acting under the order of his master, in detaining another's goods is guilty of a conversion as well as his master, *Stephens v. Elwall*, 4 M. & S. 359, 5 B. & A. 249; but a packer, having, in the exercise of his busi-

ness shipped goods which had been pledged by a factor, to several persons, under the orders of a third person, who employed him for that purpose, is not guilty of a conversion: *Greenway v. Fisher*, 1 C. & P. 190. The action may be brought against any person who was a party to the conversion, although the goods were actually converted by another; as, where an execution is delivered by A. to the sheriff against the goods of B., who, at the time has committed an act of bankruptcy, and A. gives a bond to indemnify the sheriff, and he seizes the goods and sells them, and pays the money to A., and afterwards a commission of bankruptcy is taken out against B., the assignees may bring trover against A., because, by giving the bond, he has made the conversion his own act, B. N. P. 41: and the law seems to be the same, though A. should not give a bond of indemnity, if he receive the money; *Rush v. Baker*, 2 Str. 996, B. N. P. 41, *s. c.*; and, if the sheriff seize and sell the goods, without notice of an act of bankruptcy, and before any commission issued, and pay the money over to the plt., the sheriff is excused, *Timbull v. Mills*, 1 W. Bl. R. 205, *Coppendale v. Bridgen*, 2 Burr. 818, 820; and the plt. will be obliged to refund, and be liable to an action of trover, or *indebitatus assumpsit*, at the election of the assignees, *Hitchen v. Campbell*, 3 W. Bl. R. 827, 3 Wils. 304, *s. c.*; but the mere act of a broker's making an inventory of the goods, or drawing a notice, is not sufficient to charge him in this action; 2 Esp. Rep. 553; *ante*, 864.

If the deft. be charged for a conversion by the act of his servant, the plt. must show the authority of the servant to make such conversion. A refusal, by a general agent of a party, is not sufficient evidence of a conversion by that party; therefore, in an action of trover against the deft., for not delivering some wine deposited with her by way of security for an advance for money, it was held, that it was not sufficient evidence of a conversion to show that her son, who acted as her general agent, refused to give it up, and that it was necessary to prove that such agent acted under a special direction, in order to make the deft. liable: *Pothonier v. Dawson*, Holt, 383. Proof of a refusal by the servant of a pawnbroker has been held to be evidence of a conversion by such pawnbroker: *Jones v. Hart*, 2 Salk. 441; and see *ante*, 884. A horse was kept at the deft.'s stables, and one day, when he was from home, three or four of the servants being in charge of the premises, the horse was taken away; the deft. blamed his ostlers for letting it be taken, but, on being [\*886] himself remonstrated with, replied that it was of no consequence, because he was indemnified: it was held that, in such case, trover would not lie: *Barnard v. Horn*, 1 C. & P. 366. And in trover for bricks, where the evidence to prove the conversion was, that some men fetched away the bricks in a cart on which the deft.'s name was painted, and that the men, on being asked why they did so, said they were ordered by their master, the deft., it was considered this was not sufficient evidence to connect the deft. with the transaction: *Everest v. Wood*, 1 C. & P. 75.

It seems that an incorporated company may be guilty of a conversion by the act of their agent, acting under the direction of a committee appointed for managing the affairs of such company; and, therefore, that trover is maintainable by the owner of the goods detained by the company's agent, after a notice by the plt., requiring the directors of such company to deliver the goods to him: *Duncan v. Surrey Canal*, 3 Stark. 50; and see 16 East, 6.

In trover against several defts., all cannot be found guilty on the same count, without proof of a joint conversion by all: *Nicholl v. Glennie*, 1 M. & S. 588.

Where husband and wife bring trover, and the wife is the meritorious cause of action, the plts. must prove conversion either after or before marriage, or at all events they must prove that the cause of action had its inception before marriage, 2 Saund. 47; as, where the taking of the chattel occurred previous to the marriage, though the conversion or completion of the tort did not take place till afterwards, *ante*, 568, 2 Saund. 47; and, in an action against husband and wife, for the conversion of the wife before marriage, the plt. must prove it; or for a joint conversion, or for the conversion of the wife after marriage: Stark. Ev. 1501.

An executor, it seems, cannot be sued in trover for the conversion of property by his testator, it being contrary to the maxim of "*actio personalis*," &c.: 1 Saund. 216, *a.*; 1 Cowp. 371. It lies against an heir by the executor: 2 Str. 1141. This action may be maintained against a bankrupt, even though the conversion happened before his bankruptcy, 6 T. R. 695; so also against an insolvent: 3 B. & A. 407. The action, may be supported against an infant, where goods have been delivered to him, and he refuses to return them, 1 N. R. 145; and a lunatic is liable in trover for a tortious conversion: 8 T. R. 336.

Trover cannot be maintained by one joint-tenant, tenant in common, or parcener, against his companion; for a thing still in his possession, because the possession of one is the possession of both, *Holliday v. Causell*, 1 T. R. 658, 1 East, 363; but, if one joint-tenant, tenant in common, or parcener, destroy the thing in common, the other may bring trover, 1 Taunt. 241; therefore, where one tenant in common of a ship took it away, and sent it to the West Indies, where it was lost in a storm, this was held to be evidence of a destruction, and the jury found it to be so: B. N. P. 34, 35. But the converting of a thing in common to its general and profitable application, by one joint-tenant, tenant in common, or parcener, though it change the form of the substance, is not such a destruction of the subject-matter as will give a right of action, *ib.*; as the boiling down a whale into oil, or the grinding wheat into flour, *ib.*, 247; the parties being tenants in common of the produce, just as much as they were of the original chattel, and there being no tortious conversion; and, in all cases where one tenant in common *misuses* that which he has in common with another, he is answerable to the other, in an action, as for a misfeasance: 8 T. R. 146; 2 Saund. 47, *h.* The mere sale of a ship by one tenant in common, is not equivalent to a destruction, partly, as it should appear, because the sale passes only the interest of the seller, *Heath v. Hubbard*, 4 East, 121, 1 Taunt. 241; but *quære* as to the sale of any other chattel in market overt. If one joint-tenant in [\*887] common, or parcener, bring trover against a stranger, he \*must plead the joint-tenant, &c., in abatement; and if he neglect to do so, he cannot give it in evidence on the general issue, but the plt. is entitled to recover only the value of his share, 2 Lev. 113, *Melthorpe v. Dorrington*, 1 Salk. 290, *Brown v. Hedges*, B. N. P. 35; see, also, 1 Saund. 291, *g.*, *h.*, and the authorities there cited. Two persons jointly interested in a chattel, having made a joint demand of it, may, notwithstanding, maintain separate actions of trover in respect of it, against a person who unjustly detains it: *Bleadenetal v. Hancock*, 4 C. & P. 152.

*Damages.*] We have seen that this is an action for damages, and not to recover the article itself. The damages given are usually the value of the chattel, which must be proved: see *ante*, 880. The jury, however, are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion: *Greening v. Wilkinson*, 1 C. & P. 625. In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion: *Mercer v. Jones*, 3 Camp. 447.

### *Evidence for Defendant.*

We have already seen partially what the general issue puts the plt. to prove, and what deft. may show under it. As to when necessary to plead specially, see *ante*, 872. Deft. may, under the general issue, prove that the plt. had no property whatever, either general or special, in the goods, which we have seen is necessary to support the action, *ante*, 873 to 878, as, where it has been vested in a vendee, by delivery to a carrier, 8 T. R. 330, though the carrier himself could not set up any title out of the plt., as, by receiving the goods from him, he is precluded from questioning his title, or showing a property in any other person, 3 Esp. Rep. 115; or the deft. may give in evidence a former recovery in trover for the self-same cause of action, either against himself or another, as proof of the recovery, is of itself evidence of the property being out of the plt., 2 Str. 1078; and a recovery in trespass is a sufficient bar to an action of trover for the same thing: Com. D. *Action, K. 3*; 1 Ld. Raym. 476. As to disputing the plt.'s title as executor, &c., *ante*, 503; or as assignee of a bankrupt, *ante*, 206.

The deft. may give in evidence that the plt. has not such right to the chattels as will entitle him to sue, as in the case of a landlord's bringing trover for goods seized before the expiration of the lease, as till the lease had expired, possession was in the tenant, 7 T. R. 9, *ante*, 879, 880; or, he may give in evidence a right of possession in himself, B. N. P. 48; as, that plt. had sold the chattels in dispute to a stranger, and the stranger had sold it to the deft., and that stranger is a competent witness to prove the property in the deft., 4 Taunt. 18, *recognized in* 4 B. & A. 412; or by proving that he was joint-tenant or tenant in common with the plt., when it has been ascertained no action can be supported, unless there has been a destruction or sale of chattels, *ante*, 886; and the fact of such destruction or sale as has rendered it impossible that the chattel should ever again be made use of, will then have to be proved by the plt.: 1 Taunt. 249.

The deft. may rebut the plt.'s evidence of a conversion, as, where the plt. rests his case on showing a demand and refusal, deft. may show such refusal was not an absolute, but a qualified one, *ante*, 884, 1 Camp. 410; or that he had a lien on the goods, *ante*, 637, Salk. 654, 1 Ld. Raym. 393; and, as to liens in general, see *ante*, 637; or that they were lost or stolen, *ante*, 5 Burr. 2825, 2826; or that he doubted the authority of the person empowered to receive them, *ante*, 887, 1 Esp. Rep. 83, 5 B. & A. 247; or that he purchased them in *market overt*, *ante*, 876, 2 Str. 1187,

2 Camp. 335; or he may prove that the goods were pawned with him, and sold after the expiration of a year and a day, provided the plt. has not tendered the amount previous to such sale, *ante*, 876, 5 B. [\*888] & A. 439; but, if there be \*an overplus between the amount of the goods sold and the sum for which they were pawned, the plt. is entitled to it: *ib*.

The deft. may also prove that the cause of action is not the subject of an action of trover, as, that the goods were fixtures, &c., *ante*, 880, 2 B. & C. 76, 3 D. & R. 255, s. c., 2 B. & A. 165; or he may show that the act was done with a view to the owner's benefit, and to prevent mischief occurring to other persons: *ante*, 881; 4 Esp. Rep. 165.

In *mitigation of damages*, deft. may show that he has returned the chattels: 1 Rol. Ab. 5. He may also show that he was joint-tenant, or tenant in common, with other persons, thereby merely limiting the damages to a proportionable share, but not destroying the plt.'s right of action: 4 East, 121; 5 *ib*. 420. In an action by a rightful executor against deft. as executor of his own wrong, the deft. may show, in mitigation of damages, the due payment of the deceased's debts, Carth. 104; but it would afford no ground of defence to such action that deft. had duly paid all the moneys he had received: *Mountford v. Gibson*, 4 East, 447; 2 Ph. Ev. 175; *sed vide* B. N. P. 48.

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TRUSTEE.—See Index, *Trustee*.

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USAGE.—See Custom;—Index, *Usage*.

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[The usage and general course of business must be proved by witnesses speaking to instances in which, to their own knowledge, it has been acted on: *Hall v. Benson*, 7 Car. & P. 711.]

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## USE AND OCCUPATION, ACTION FOR.

FORM OF REMEDY, 888.

FORM OF PLEADINGS, 889.

PRECEDENTS, *ib*.

EVIDENCE FOR PLAINTIFF, 890.—*The Contract*, 891.—*Plaintiff's Title*, 892.—*Defendant's Occupation*, 893.—*Damages*, *ib*.

EVIDENCE FOR DEFENDANT IN GENERAL, 894.—*Determination of Tenancy*, *ib*.—*Eviction*, *ib*.

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FORM OF REMEDY FOR.] It was formerly considered that assumpsit could not be maintained for rent, &c., issuing out of real property, though not reserved by deed, unless there were an express promise to pay, the demand as it was said, savouring of the realty, 1 Rol. Ab. 7; to remedy



which the 11 G. 2, c. 19, was passed, by which it is enacted, that, where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the lands occupied by the deft., in an action on the case, for the use and occupation of which it was so held or enjoyed; and, if, in evidence on the trial of such action, any parol demise, or any agreement (not being by deed) wherein a certain rent is reserved, shall appear, the plt. in such action shall not, therefore, be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." If there be an agreement by deed to let a house, &c., by words not amounting to an actual demise, the plt. should sue in assumpsit, or debt, for use and occupation, 4 Esp. Rep. 59; and, in cases where there is no specific rent agreed on, the action for use and occupation seems the only remedy; 5 B. & A. 322; 2 Taunt. 145. The action must

\*be founded on a *contract*, and cannot be supported, unless [\*889] there be a contract express or implied between the parties:

1 T. R. 378. And, in cases where the possession is adverse, assumpsit cannot be supported; but the plaintiff must declare in ejectment or trespass, as the law will not, in such case, imply a contract: 1 T. R. 386; 2 Ld. Raym. 1216; Woodf. L. & T. 352. But, if a tenant hold over, the landlord may treat him as his tenant: 1 Camp. 360; 1 T. R. 162, 386; see *post*, 891, *ante*, 111, 337.

In the case of a corporation, the law will imply not only a promise, but an existing tenancy in those who hold the land of a corporation; and a corporation aggregate may therefore sue in assumpsit for use and occupation, where the tenant has held premises under them, and paid rent: *Mayor, &c. of Stafford v. Till*, 4 Bing. 75.

Debt also lies at common law for use and occupation of houses or land, &c., on a demise not under seal: 5 Taunt. 25; 6 *ib.* 62; 6 East, 348. The remedy given by the statute is not co-extensive with the remedy given by action of debt for rent: 2 H. Bl. 320; 1 B. & B. 56. Where it is doubtful whether there be a demise under seal, it is advisable to declare in debt on a demise, as in 1 Saund. 276, *n.* 1, 202-3; 1 N. R. 104; with a count for use and occupation.

Covenant or debt is the only remedy for rent due on a lease under seal: see *ante*, "*Lease*."

. FORM OF PLEADINGS.] The venue in this action is not local, 5 Taunt. 25, except where the demise was not to the deft. when it perhaps may be local, as in an action against the assignees of the lessee in covenant: 1 Saund. 241; *ante*, 621. The 11 G. 2, c. 19, s. 14, *ante*, 888, gives the form of remedy under the usual common *indebitatus* count. In such count it is unnecessary to state any particulars of the demise, 6 East, 347, or in what parish the premises are situated: *ib.*; Taunt. 570; 2 Camp. 3. And, where the situation of the premises is alleged in the declaration, a variance in the name of the parish would be fatal: 3 Camp. 236; 4 Taunt. 700; 1 Moo. 161; 2 *ib.* 587. A parish, known by one name as well as the other, may be described by either name: 1 Taunt. 570; 2 Camp. 3. As the deft. cannot plead *nil habuit*, 1 Wils. 314, 2 *ib.* 208, it seems immaterial to allege that the estate was the plt.'s: 2 Chit. Pl. 41. This count may be supported, though the deft., to whom the premises were let, did not himself occupy them, but underlet them to another person, 8 T. R. 327; or though the premises were destroyed by fire, after the letting and

before the rent became due, 4 Taunt. 45, or though the deft. never attorned to plt.: *post*, 892. If it be doubtful whether there be a demise under seal, it is best to declare in debt on a demise, with a count for use and occupation; 1 Saund. 276; 1 N. R. 104. As to declarations on leases, see *ante*, "*Lease*," 621.

The plea of the general issue will put the plt. upon proof of all the material facts necessary to support the action, as to which, see *infra*; as to other pleas, see *ante*, 623, and the various titles of defences throughout the work. Deft. cannot plead *nil habuit in tenementis*: 464, 623-6.

### Precedents.

#### INDEBITATUS COUNT FOR USE AND OCCUPATION.

(*The commencement of the indebitatus count is as ante, 139, in assumpsit, and as ante, 408, in debt.*) For the use and occupation of a certain dwelling-house, messuage, farm, lands, and premises, with the appurtenances, of the said plt., by the said deft., and at his special instance and request, and by the sufferance and permission of the said plt., for a long time then elapsed, had, held, used, occupied, possessed, and enjoyed. And, being so indebted, &c. (*Conclusion as ante, 139, in assumpsit, and ante, 408, in debt.*) **[\*890]** *The quantum meruit thereon in assumpsit is as ante, 139, inserting "as follows:)"* Had, before that time, suffered and permitted the said deft. to have, hold, use, occupy, possess, and enjoy, a certain other dwelling-house and, &c., premises, with the appurtenances, of the said plt.; and that he, the said deft., had, according to the said last-mentioned sufferance and permission of the said plt., had, holden, used, occupied, possessed, and enjoyed, the same for a long space of time then elapsed, he, the said deft., undertook, &c. (*Conclusion is as ante, 139.*)

#### INDEBITATUS COUNT FOR THE USE AND OCCUPATION OF UNFURNISHED LODGINGS.

(*The commencement of the indebitatus count is as ante, 139, in assumpsit, and ante, 408, in debt.*) For the use and occupation of certain rooms and apartments of the said plt., in and parcel of a certain dwelling-house and premises, by the said deft., and at his special instance, &c., and by the sufferance and permission of the said plt., for a long space of time before then elapsed, had, held, used, occupied, possessed, and enjoyed; and, being so indebted, &c. (*Conclusion as ante, 139, in assumpsit, and ante, 408, in debt.*) *The quantum meruit thereon in assumpsit is as ante, 139, inserting as follows:)"* Had, before that time, permitted the said deft. to have, hold, use, occupy, possess, and enjoy certain other rooms and apartments of the said plt. in and parcel of a certain other dwelling-house and premises; and that he, the said deft., had, according to the said last-mentioned sufferance and permission, had, holden, &c., the same for a long space of time, then elapsed, he, the said deft., undertook, &c. (*Conclusion is as ante, 139.*)

#### INDEBITATUS COUNT, FOR THE USE AND OCCUPATION OF FURNISHED LODGINGS.

(*The commencement of the indebitatus count is as ante, 139, in assumpsit, and ante, 408, in debt.*) For the use and occupation of certain rooms and apartments of the said plt. in and parcel of a certain dwelling-house and premises, by the said deft., and at his special instance, &c., and by the sufferance and permission of the said plt., for a long space of time before then elapsed, had, held, used, occupied, possessed, and enjoyed, together with certain furniture, linen, and other necessaries, goods, and chattels, of the said plt., therein being; and, being so indebted, &c. (*Conclusion as ante, 139, in assumpsit, and ante, 408, in debt.*) *The quantum meruit thereon in assumpsit is as ante, 139, inserting as follows:)"* Had, before that time, suffered and permitted the said deft. to have, hold, use, occupy, possess, and enjoy, certain other rooms and apartments of the said plt. in and parcel of a certain other dwelling-house and premises; and that the said deft. had according to the said last-mentioned sufferance and permission of the said plt., had, holden, &c., the same, together with certain other furniture, &c., of the said plt., therein being, for a long time before then elapsed, he, the said deft., undertook, &c. (*Conclusion is as ante, 139.*)

See other precedents of declaration for the use and occupation of a fishery, 2 Chit. Pl. 42; of a way, *ib.*; of a pew, *ib.*, 43; of a tennis court, *ib.*, 44; of an inn, and profits, *ib.*; for double rent, *ib.*, 45; for use of pasture-land, and catage of grass, *ib.*; debt for rent, *ib.*, 430; covenant for, *ib.*, 549.

### *Evidence for Plaintiff.*

The evidence for plt. may consist in proof of the contract, of reciting his title, deft.'s attornment, deft.'s occupation, and the damages.

*Proof of Contract.*] A contract, express or implied, must be proved: 1 T. R. 378, 387. If there was any express contract between plt. and deft., the same should be proved by calling the witnesses present at the time of making it. If there was any written agreement for the tenancy, it must be produced, duly stamped as a demise, and proved in the usual way: 3 Esp. Rep. 213; 1 N. R. 272; 2 M. & S. 445; 12 East, 237; 2 Moo. 349; 8 Taunt. 327, *s. c.* The contract may be implied from circumstances. As to proof of the plt.'s title and deft.'s occupation, see *post*, 189, 2. Where the deft. has entered into a contract of sale, which ultimately\* goes off, and his occupation has been a beneficial one, he is [\*891] liable in this action on an implied contract, *Hearn v. London*, Pea. Rep. 192; *aliter*, when the occupation has not been beneficial, *ib.*, or when the plt. has derived an equivalent benefit from the contract, as where he retains the purchase-money during the whole time of the occupation: *Keriland v. Pounsett*, 2 Taunt. 145. Where, on an agreement for the sale and assignment of certain premises, there was a stipulation "that in the meantime, and until the assignment was made, the intended purchaser should pay and allow to the seller, at the rate of £100 per annum, from the time of taking possession of the premises, until the completion of the purchase," and the intended purchaser having taken possession, and one half-yearly payment having become due before the completion of the purchase, it was held due as rent: 6 B. & C. 524; 2 C. & P. 294, *s. c.* As to when plt. may waive a tort, and sue in assumpsit for use and occupation, see *ante*, 111, 889. See a case where deft. was held liable where he obtained possession under a false representation: *Hull v. Vaughan*, 6 Price, 157. A mortgagor is tenant to his mortgagee: 5 B. & A. 604.

*Proof of Title.*] Where an actual contract of tenancy between plt. and deft. can be proved, no proof of the title will be requisite, it being an established rule, that a tenant cannot dispute his landlord's title: 5 T. R. 5 Bing. A. 54; 5 Moo. 298, *s. c.*; Holt, 491, 1 Wils. 314. And where deft. came in under plt., he cannot even show that plt.'s title has expired, 4 T. R. 682, 3 M. & S. 516; unless deft. can also show, that he solemnly removed such title at the time of the expiration, and attorned to the party having the title, by paying him rent or otherwise: 2 Camp. 11. 2 Stark. 230; 14 East, 488; 1 Bing. 360. Where the plt. has at any time distrained on the deft. for rent in arrear, and he did not replevy, it will afford strong evidence of the plt.'s title: *Panton v. Jones*, 3 Camp. 372. The fact of taking the distress may be proved by the broker, or other person employed by him; who should be served with a *subpœna duces*

*tecum* to produce his authority, &c. If deft. has ever paid rent to the plt., proof of that alone will be *prima facie* sufficient to enable the plt. to recover, *Hearn v. Tomlin*, Pea. Rep. 192, *Kiriland v. Pounsett*, 2 Taunt. 145; 2 Bing. 10; but deft. might show, that the payment was made under a misrepresentation: 1 Marsh. 514; 6 Taunt. 202, *s. c.*; 7 Moo. 299; 3 Bing. 475; 1 B. & P. 326. And the payment of rent by a lessee to a lessor, after the title of the latter has expired, and after the lessee had notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment, it be proved the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired: 9 Moo. 38; 2 Bing. 10, *s. c.*; and see 3 Bing. 475. The effect of the payment of rent may be destroyed by the non-claim of rent for several years, and by showing a strong ground to suspect the title of the party to whom the attornment was made: 7 Moo. 289. And a person, by paying rent to church-wardens, cannot make them a corporation, when they are not so by law, and will not be estopped from disputing their title: *Phillips v. Pearce*, 5 B. & C. 433. To establish the fact of a former payment of rent, the plt.'s receipt for the rent may be proved, for which purpose, notice to produce it should be served on the deft., or it should be proved by a witness who saw him pay the rent, and take the receipt: see *ante*, "Payment."

If the deft. did not come in under the plt., or has not recognized his title, the plt. will be obliged to establish his title, from the party who was the deft.'s original landlord. After such title is proved, the deft. cannot dispute it further. Thus, where A. hired apartments by the year from B., and B. afterwards let the whole house to C., who sued A. for use and occupation, it was held that, after proof of the letting from B. to [\*892] C., A. could not impeach C.'s title: *Rennie v. Robinson*, 1 Bing. 147; 7 Moo. 539; 1 D. & R. N. C. P. 1; *ante*, 464.

If the plt. claim as heir, executor, administrator, devisee, legatee, or assignee of the first lessor, and the deft. has never paid him rent, the plt. must show that the deft. held as tenant to the person under whom he derives his title. If the plt. claim as heir, he must prove his ancestor's death,—that is, where the lessor was seized in fee: *ante*, 457.

If the plt. claim as devisee, or legatee, and the lessor was seized in fee, the plt. must prove the testator's will by producing the will itself: *ante*, 458, *post*, "Will." Where, however, the plt. is a legatee, and the deceased had only a term for years in the premises, which he had bequeathed to the plt., he must produce the probate of the testator's will, in which the premises in question are bequeathed to the plt., and must also show the assent of the executor the devise, as necessary to give him a title to the lease under which he claims rent: *Doe v. Guy*, 3 East, 120. The executor's assent will be proved, by showing, that he suffered the legatee to take undisturbed possession of the premises bequeathed, and received the rents and profits, or that he expressly assented: *ante*, 459.

If the plt. claim as assignee of the lessor, he must give in evidence a regular title from him, by showing the deeds and conveyances which constitute his title: *ante*, 473.

If the plt. claim as executor or administrator, he must make proof of the probate, or letters of administration, which will be sufficient, where there is no plea of *ne unques executor or administrator*: where those

pleas are pleaded, the probate or letters testamentary must be produced: *ante*, 503.

*Proof of Attornment.*] This evidence is unnecessary, though we have seen it is advisable to adduce it, for the purpose of superseding the necessity of proof of title. Formerly, attornment was necessary to support this action, where the deft did not come in under the plt., but now the necessity and efficacy of attornments have been almost totally taken away by the statutes 4 and 5 Anne, c. 16, s. 9, 10, and 11 G. 2, c. 19, s. 11. Under the former of these acts, it has therefore been held that the trustees of one, whose title the tenant had notice of before he paid over his rent to his original landlord, might support this action, although the tenant had no notice of the legal estate being in the plt. on the record: 16 East, 99; 7 Moo. 539. And the grantee of an annuity charged on the land, or a mortgagee, after notice to the tenant, may also recover rent from the tenant, in an action for use and occupation: 1 T. R. 378; Dougl. 279; Chit. Cont. 107.

*Proof of Defendant's Occupation.*] Proof of an actual occupation by the deft. is not essential: proof of the contract or tenancy will suffice, and he need not prove that the deft., in fact, entered and occupied the premises: it is sufficient if the deft. might have done so if he pleased, and was not prevented by the plt.: *Harland v. Bromley*, 1 Stark. 453; 5 Taunt. 519. If A. agree to let the premises to B., who permits C. to occupy them, B. may be sued for use and occupation: 8 T. R. 327. And, where a house is demised by a written agreement, rent may be recovered, which has accrued after the house has been burnt down, *Baker v. Holtpzaffel*, 4 Taunt. 45; and so it is recoverable, though deft. has deserted the premises: *Mollett v. Brayne*, 2 Camp. 103; And a tenant who has quitted, in pursuance of a parol license from his landlord, and without having given a regular notice to quit, remains liable: *Matthews v. Sawell*, 8 Taunt. 270; *Conolly v. Baxter*, 2 Stark. 527; *Johnstone v. Huddleston*, 4 B. & C. 922; 7 D. & R. 411, s. c. As to when tenant discharged by a surrender of the term, &c., see *post*, 894.

When the plt. cannot prove a contract of tenancy or attornment by deft., he must establish his title, as *ante*, 891, and prove the deft. actually \*occupied the premises during the time for which the rent [\*893] is sought to be recovered. It will, in such case be *prima facie*, sufficient to prove that the deft. occupied the premises, and the continuance of the occupation will be presumed, till the contrary appear: see *Howland v. Bromley*, 1 Stark. 455; *Ward v. Mason*, 9 Price, 291.

By 6 G. 4, c. 16, s. 75, any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or nonperformance of the conditions, covenants, or agreements, therein contained; and, if the assignees decline, the same shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid. Before this act, assumpsit for use and occupation lay against a lessee, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of the assignees

during part of the time for which the rent was due: *Bont v. Wilson*, 8 East, 311. However, where assignees entered and occupied the premises in the middle of the year, it was held that they were not liable for the bankrupt's occupation as well as their own: 2 H. Bl. 319; *Gibson v. Comthorpe*, 1 D. & R. 205.

*Damages.*] Where there is a stipulated rent, plt. will be entitled to recover to that amount; in other cases, however, he must prove the value of the premises: *Tomlinson v. Day*, 2 B. & B. 680. Where the plt. is not the person who originally let the premises to the deft., he can only recover rent from the time he had the legal title in him, although he may have had the equitable estate long before, 2 Camp. 13, *n.*; and though he has acknowledged the title: 3 Bing. 474. An entire contract cannot be apportioned. Therefore, under a tenancy from year to year, where the tenant, the deft., quitted without any notice at the expiration of a quarter, and the landlord, during the next quarter, let the premises, it was held he could not recover any part of that quarter's rent, *Hall v. Burgess*, 5 B. & C. 332; and so, if a tenant quitted in the middle of the quarter: *Walls v. Atcheson*, 3 Bing. 462. [Where an upper floor of a house was occupied at a rent payable quarterly, and during the currency of the quarter, the house was burnt and rendered uninhabitable, it was held that the landlord was nevertheless entitled to recover, in an action for use and occupation, at least the amount of rent for the occupation up to the time of the fire from the quarter-day preceding: *Parker v. Gibbons*, 1 Gale & Dav. 10.]

#### *Evidence for Defendant.*

The deft.'s evidence under the general issue may consist in rebutting plt.'s proofs of the contract, the plt.'s title, and deft.'s occupation. We have already seen when deft. will be estopped disputing plt.'s title. Deft. may prove a payment of the rent to his lessor before notice of the assignment of the estate to the plt., who is an assignee of the reversion: 1 T. R. 378; 16 East, 99; *ante*, 464. Where the deft. is charged on his own account, he may show that he occupied as administrator, &c. And, where the deft. proved that he took possession as administrator, and that the premises had been unproductive to him, and that he had offered to surrender them eight months after the intestate's death, it was held a good defence: *Remnant v. Bremridge*, 8 Taunt. 191. Deft. may show that, as a valid ground of defence, he entered and occupied the premises, not in the character of a tenant, but under a contract for the purchase of them, and that plt. had a benefit under the contract, *ante*, 891; or as a trespasser, *ante*, 889; and that the plt. treated him as such; that he recovered against him in ejectment, 1 T. R. 378; but the mere bringing the action would, in such case, be no bar: *Cibb v. Carpenter*, 2 Camp. 13, *n.*

*Illegal Consideration.*] Deft. may show that the house was let for an unlawful or immoral purpose, as for a brothel: *Girardy v. Richardson*, 1 Esp. Rep. 13; *Jennings v. Throgmorton*, R. & M. 251.

[\*894] \**Premises Untenantable.*] Deft. may show that the landlord was bound to put the premises into repair before the tenant took possession, which he had neglected to do, and that, in consequence, they were uninhabitable, or that they were become unsafe and useless from

want of repair, and that the tenant was not bound to repair; in which case he would not be liable, though he may have given notice to quit: *Edwards v. Etherington*, R. & M. 268. *Salisbury v. Marshall*, 4 C. & P. 65.

*Determination of Tenancy by Notice to quit.*] The deft. may prove this fact as a defence to an action for rent, accruing after such determination of the tenancy, and where deft. has not occupied the premises. As to notices to quit, and when valid, &c. see *ante*, 464 to 470.

*Determination of Tenancy by Assignment or Surrender.*] Deft. may establish this as a defence to an action for any rent claimed after such determination. By the Statute of Frauds, 29 Car. 2, c. 3; s. 3, a parol assignment, or license to quit, will be insufficient, *Botting v. Marten*, 1 Camp. 318, though the deft. has quitted accordingly, *Mollet v. Bourne*, 2 Camp. 103; or though the plt. has endeavoured to relet the premises, 2 Stark. Ev. 590, 3 Esp. Rep. 225; or though the agreement between the parties be cancelled, 6 East, 86; and see *Johnstone v. Huddleston*, 4 B. & C. 922; 7 D. & R. 411, s. c.

The assignment or surrender may, however, by the words of that statute, be effectual by act and operation of law, though not made in writing; as, if the plt. gave a parol license, or notice to quit, in the middle of a quarter, and both parties acted upon it, that is, if the plt. himself took possession, the tenancy would thereby be legally determined: *Whitehead v. Clifford*, 5 Taunt. 518; *Peter v. Kendal*, 6 B. & C. 703. The deft. may show that the landlord had accepted another person as tenant, which would operate as a surrender of his term: *Thomas v. Cook*, 2 B. & A. 119. And, where a yearly tenant, at a rent payable half-yearly, quitted without having given notice, and the landlord let the premises to another tenant before the expiration of the next half year, it was held that he was not entitled to recover from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord relet them to the second tenant: *Hall v. Burgess*, 5 B. & C. 332. The deft. may show that the landlord has determined the occupation, by accepting the key of the house, &c., *Whitehead v. Clifford*, 5 Taunt. 518; but it must be clearly established, that it was the landlord's intention to determine the tenancy by accepting the key, as it would be insufficient to show merely that the key was left at plt.'s house, or delivered to his servant: *Horland v. Bromley*, 1 Stark. 455. And in all these cases the consent of all the parties to the change of the tenancy is necessary; 2 B. & A. 119; 1 *ib.* 50. And where a tenant from year to year, by a Lady-Day holding, agreed by parol with his landlord's agent to quit at the ensuing Lady-Day, which was within half a year, and the premises were relet by auction, at which the tenant attended, and bid, but the new tenant was not let into possession, because the old tenant refused to quit, it was held that this did not amount to a sufficient surrender: 1 McCl. & Y. 141; and see 2 Moo. 262, 272; 3 B. & C. 478; 5 D. & R. 206, s. c.

*Eviction.*] An eviction by the landlord of the deft. or his under-tenant, 1 Stark. 94, may be shown by deft., which will be a complete answer to the action, and after an eviction from part, if the deft. give up possession of the residue, he is entirely discharged; if, however, after eviction,

he continues in possession of the residue, he would, perhaps, be liable, upon a *quantum meruit*, for the residue: *Smith v. Raleigh*, 3 Camp. 514, n. See further, as to an eviction, *ante*, 631.

[\*895]

## \*USURY, DEFENCE OF.

**PLEADINGS AS TO.]** The deft. may give usury in evidence under the general issue, in *assumpsit*: *Bernard v. Saul*, 1 Str. 498. And plt. will not be permitted to recover, if it appear, upon the face of the declaration, in *assumpsit*, that the contract is void for usury: *Lutw.* 273. But this is not the case in debt on specialties; and matter which shows that the deed was merely avoidable in respect of usury, must be pleaded specially: *ib.*; *Com. D. Pleader*, 2 W. 23. A plea of usury may be pleaded with *non est factum*: 2 B. & P. 12.

The chief requisite of a plea of usury is, that it should state the corrupt contract and the usurious interest with the greatest precision and particularity, to show how the usury was committed, and that the party may know what to answer; and if it be too generally stated, it will be bad on special demurrer: *Hill v. Montagu*, 2 M. & S. 378; 1 Camp. 165, n. And the plea will be insufficient, unless it state that the deft. was indebted to the plt. at the time the bond, &c., was given; or that there was given an agreement to lend money upon the usurious contract, 12 Mod. 385; and that the land was given for the payment of usurious interest: *Cro. El.* 104. And the *quantum* of the usurious interest must be specified, *Hinton v. Roffee*, 2 Show. 329; and it must also be stated, that the unlawful interest was for forbearance and giving day of payment, *Sir W. Jones*, 409; and the statute must be specially averred, though it would be improper to recite it: *Lutw.* 464; *Bro. Vad. Mec.* 255.

**Replication.]** Where the deft. pleads the usury in the contract, the plt. may reply, that the contract was made upon a good and legal consideration, and not upon the supposed unlawful consideration mentioned in the plea: *Com. D. Pleader*, 2 W. 23; 2 T. R. 439.

See form of plea, 3 Chit. Pl. 966.

*Evidence.*

**On whom Proof Lies.]** Upon the plea of usury, the proof lies entirely upon the deft., as by his plea he admits the debt: *per Holt, C. J.*, 12 Mod. 517.

**What amounts to, and how proved.]** By 12 Anne, st. 2, c. 16, "no person on any contract, shall take directly or indirectly, for loan of any monies, wares, merchandises, or other commodities whatever, above the value of £5, for the forbearance of £100, per year, and so after that rate for a greater or less sum, or for a longer or shorter time;" and "all bonds, contracts, and assurances, whatsoever, made for payment of any principal, or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of £5 in the hundred, as aforesaid, shall be utterly void."



And on this statute the law of usury now rests: parts, however, of 37 H. 8, c. 9, and 13 El. c. 8, are, at times, called in to explain it.

To constitute usury under this act, there must be: 1, a contract with an unlawful intent to take illegal interest: 2, a direct loan and a taking of, or agreement to take, illegal interest for the forbearance of repayment, or there must be some device for avoiding the appearance of a loan, or forbearance, when one existed, 3 Chit. Com. L. 88: 3, the principal should be put in hazard: 4, the contract must be tainted with usury in concoction, and any subsequent corrupt contract will not invalidate it: *Purr v. Eliason*, 1 East, 95.

\*1. It must be shown that there was a contract or agreement for usurious interest; for, if the interest appear to have been [\*896] reserved by mistake or upon an error in computation, the contract will not thereby be avoided: 1 Camp. 149. But, where the agreement is on the face of it clearly usurious, the intention of the parties, and that they were ignorant of the fact, will not prevent it from being void: 3 B. & P. 159.

2. The loan must appear to be one properly so called,—that is, temporary letting for profit, of the use of money, goods, &c., to be returned to the lender. Therefore, on stipulation that London bankers should accept and pay bills drawn in the country for a commission of five per cent., being furnished with funds to pay the bills before they became due, is not usurious, as no loan is contemplated: 3 Camp. 488. Nor is it usury for an acceptor of a bill to discount his own acceptance at a premium: *Barclay v. Walsley*, 4 East, 55. Nor is a *bond fide* sale of a bill, for a less sum than the amount of the bill, usurious, 1 P. W. 782-3; if, however, the sale be a mere pretext, it is otherwise: *R. v. Ridge*, 4 Price, 56. Where money is lent by a check upon a banker, without a previous agreement to consider the check as cash, it is no loan or forbearance within the statute of usury; till cash is actually received for the check: *Brook v. Middleton*, 1 Camp. 445; *Ellenborough*; 10 East, 268. And a remittance, by an agent, to whom goods are consigned, of the propable amount of the proceeds of the goods by anticipation to his principal, would not seem to amount to a loan, so as to make a charge of £6 per cent. usurious: 3 B. & C. 626; 5 D. & R. 500, s. c.

Nor is usury committed with respect to a charge for commission, where the excessive charge is referable to the trouble, expense, and inconvenience incurred by the lender of the money, and not to a charge of interest: *Aurial v. Thomas*, 2 T. R. 52; *Holt*, C. 263; *Stoveld v. Eade*, 4 Bing. 81. Whether a commission of one half per cent., upon a banking account, be usurious or not, is a question for the jury, depending upon whether it may be ascribed to a reasonable remuneration for trouble and expense, or whether it be a colour for the payment of interest above £5 per cent. upon a loan of money; and if there be a contrariety of evidence upon that point, the court will not set aside the verdict, and grant a new trial, although the verdict be against the opinion and direction of the Judge who tried it, unless it appear clearly that the jury have drawn an erroneous conclusion: *Carstairs v. Stein*, 4 M. & S. 192. And, where a Judge leaves it to the jury to draw their own conclusion on a question of usury, their verdict cannot be disturbed on account of an erroneous opinion upon the matter of fact expressed by the Judge: *Solerti v. Mcville*, 7 B. & C. 430; *R. & M.* 198.

Taking of discount in advance on the loan of money advanced in discounting bills, when negotiated in the ordinary course of trade, is not usurious: *W. Bl. R. 792*; *Holt. C. 272*; *3 B. & P. 154*. And, if a person upon whom a bill is drawn, which has some time to run, gives the amount of the bill to the holder, deducting from it a sum more than the legal interest for the time the bill has to run, it is not usury: *Barclay, p. t. v. Walmsley*, 4 East, 57, s. c.; *5 Esp. Rep. 11*. Therefore, the acceptor of a bill, dated *4th July*, and due *7th September*, taking a premium of sixpence in the pound, from the indorsee and holder, for payment of the bill on the *20th August*, before it was due, is not guilty of usury: *ib.* But an agreement, on discounting a bill, that the party should take in part payment another bill, which had time to run, as cash, although the full discount was taken, is usurious: *Parr v. Eliason*, 1 East, 92. If a country banker, discounting a bill, takes interest for the whole time it has to run, and instead of paying money for the bill, gives notes payable in London, at three days after sight, such country banker is guilty of usury: *Matthews v. Griffiths*, Pea. Rep. 200, *Kenyon, s. c.*; *1 B. & P. 155, n.* But where a country banker gave a draft on his *London* agent, payable at two months, in exchange for a country bill of like date, deducting by way of commission a sum equal to *four per cent.* for the time the bill had to run, it was held not to be usurious: *Stoveold v. Eade*, 12

*Moo. 277*. If a party, in discounting a bill, makes the holder [\*897] of it take goods of a certain ascertained\* value, at a higher value, that shall be deemed usury: *Pratt v. Willery*, 4 Esp. Rep. 40. Though a loan have the form and complexion of a sale, it will be void; if, however, it appear that a sale were intended, the contract is valid; but this is a question for the jury as to the real intentions of the parties. And thus, where A., in consideration of a certain sum of money, conveys premises to B., and at the same time, an agreement is entered into between them, that A. shall purchase the same premises, within fifteen months at a considerable advance upon the original purchase-money, and B. agrees to sell and reconvey at such advance, it was held, *per Gibbs, C. J.*, that in point of law, such contract was not usurious, unless it were meant as a cover for a loan of money, which was a question of fact for a jury: *Doe d. Metcalf v. Brown*, *Holt, C. 295*. An agreement to pay £12 per cent. on the amount of the purchase-money is not usurious, though there be a covenant to keep the vessel insured, and that the plt. shall be entitled to his share of the money, to be recovered from the underwriters: *Grigg v. Stoker*, *Forrest, 4*. And an agreement for the payment of the purchase-money of an estate by instalments, with interest beyond the legal rate, is not usurious, if the sum stipulated for as interest is in fact a part of the purchase-money: *Bute v. Bigood*, *M. & R. 143*; *7 B. & C. 453, s. c.* But a beneficial lease obtained under the influence of loans of money, made or expected to be made by the lessee to the lessor, a distressed man, has been considered void, and a fraudulent evasion of the statute: *1 S. & L. 182*. And an agreement that, upon the advance of money by A. to B., A. shall assign to B. the lease of premises of greater value, with a power of redemption on repayment of the money, and that in the meantime, B. shall grant A. an under-lease of the premises at a greater rent than the legal interest of the money, A. insuring the premises and paying the ground-rent and taxes, is usurious, the agreement being intended as a security for the loan, and not as a purchase for

the lease: 4 Camp. 1. Where a contract for the loan of money is void for usury, a separate security for the principal or interest only cannot be enforced, Cro. Jac. 252; and it is immaterial that the usurious contract is to be executed, and is evidenced by two separate instruments instead of one: *White v. Wright*, 3 B. & C. 273; 5 D. & R. 110, *s. c.*

The statute extends to loans of money's worth, as stock, as well as money. Thus, where A. lent £400 stock to B., taking as security an agreement from B. to replace the stock on request, and a bond for the payment of the produce of the stock, and reserving to himself the dividends of the stock for interest, and the option either to have the stock replaced or the produce of it paid in money with interest, at 5 per cent., it was held usurious: *White v. Wright*, 3 B. & C. 273; 5 D. & R. 110. And it would seem, that lending money on continuation is usurious: *Smedley v. Roberts*, 2 Camp. 607, Ellenborough. And, where A. gave to B. three bills of exchange, as security for money lent, and usurious interest thereon, and, before the bills became due, B. advanced to A. a further sum of money upon his general credit and account, by means of which A. was enabled to pay the bills, it was held that, by such payment of the bills, the usurious interest was also paid: *Wright v. Laing*, 8 B. & C. 165; 4 D. & R. 783.

Usurious contracts are to be proved as alleged. It is sufficient to prove the loan or forbearance, according to its substance and legal effect. A forbearance by C. to A. is proved by evidence that A. is debtor to B., and B. to C., and of an agreement, for an usurious consideration to be paid to C., that he shall take A. as his debtor, *Wade v. Wilson*, 1 East, 195, although B. join A. in the security to C.: *ib.* So it would be by evidence of a loan by C. to B., and the giving a note as security by A. to C., more than legal interest having been taken for forbearance on the note: *Manners v. Poston*, 3 B. & P. 343; Stark. Ev. 1522. If goods be taken in part of money agreed to be advanced as a loan, the law, it seems, will not \*presume usury, and the [\*898] lender is not to be called on to show their real value. But, where the borrower is compelled to take the goods, it will create a suspicion that usurious interest was contemplated, and it will therefore be incumbent on the lender to show that the goods were reasonably worth the sum charged: 2 Camp. 375, 553; 1 Esp. Rep. 40.

3. Risk.—The contract will not be usurious, notwithstanding more than £5 per cent. is reserved on the loan, if the principal and interest are subject to risk, and the lender, on some specified contingency, runs the risk of losing both: Cro. J. 208; 4 T. R. 356; 4 Camp. 4.

Thus, an extorting *post-obit* bond, however gross, cannot be considered as usury: *Matthews v. Lewis*, 1 Anst. 7. A bond in the penalty of £200, conditioned for the performance of articles of partnership, was held not to be an usurious contract: *Morriset v. King*, 2 Burr. 891. A real *bona fide* wager, not at all intended as a loan, is not an usurious contract: *Lamego v. Gould*, 2 Burr. 715, *s. c.*; 2 Ld. Ken. 422. But, if it appear, that the contingency contemplated in the agreement is so slight as to be nearly allied to a positive certainty, or appears to be a mere device to evade the statute, or if the casualty affects the interest only, and not the principal, it will be held usurious: Cro. J. 508; 3 B. & C. 277.

4. To defeat a debt on the ground of usury, the contract must have

been usurious at the time the debt was created; for, if the demand do not originate in, or accrue from, a usurious bargain, no after-reservation of illegal interest, or subsequent arrangement for a usurious security, will avoid the original claim: 3 T. R. 539; 1 Saund. 295, *n*. And, if a bond be given for the repayment of money, with interest at £5 per cent., proof that the obligee has received interest at 7½ per cent. will not void the bond, unless the jury are satisfied that it was agreed, at or before the execution of the bond, that more than £5 per cent. should be paid: *Fussil v. Brookes*, 2 C. & P. 318.

*Renewed Security.*] A contract originally tainted will not be rendered valid by taking any renewed security for the illegal interest, unless there is an express agreement to expunge the original bad part of the debt, or forego the excess of interest. A security given in lieu of a former security, which was tainted by usury, is void, unless, in the second security, a deduction is made of all sums paid usuriously under the former security: *Wickes v. Gogerly*, 2 C. & P. 397; 1 R. & M. 123, *s. c.* A party cannot recover on a new instrument which operates as a security for any usurious interest, although it is founded upon a new settlement of the account between the borrower and lender, and the original securities have been cancelled: *Preston v. Jackson*, 2 Stark. 237. A fresh security, given for the balance of a debt originally usurious, is so likewise: *Pickering v. Banks*, Forrest. 72. But a *bona fide* debt is not destroyed, by being mingled with an usurious contract relating to it: *Gray v. Fowler*, 1 H. Bl. 462.

And it is not usury where the payment is not in the nature of a penalty, as where it is in the election of the borrower, at the time of entering into the contract, to avoid paying any more than five per cent., by payment at the day: *Floyer v. Edwards*, Loft, 395. If A. be indebted to B. in £80, and give a promissory note for £87 3s., payable by four quarterly instalments (being the amount of principal and interest to the time of the last instalment,) and that, in case default should be made in payment of any one instalment, the whole sum should become payable, it has been held, that A. is entitled to recover the whole of such sum, on default being made in payment of the first instalment, as it was a stipulation between the parties in nature of a penalty, and therefore not a usurious contract or agreement: *Wells v. Girling*, 4 Moo. 78; 1 B. & B. 449, *s. c.* And, where usurious security is given for a legal subsisting debt, although the security is void, the debt is not extinguished: *Phillips v. Cockayne*, 3 Camp. 119, *Ellenb.* If a bond, void on the ground of usury, [\*899] be cancelled, and another \*taken, after a deduction from the original principal, of a payment made under the former one, the latter is valid: *Wright v. Wheeler*, 1 Camp. 165, *n. Lawrence*. After usurious securities, given for a loan, have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is sufficient: *Barnes v. Hedley*, 2 Taunt. 184, *s. c.*; 1 Camp. 157, 190.

Where the contract and loan have been made abroad, and are not usurious in the country where they were made, they will not be considered so in this country: 3 B. & C. 626; 5 D. & R. 500.

By the statute 58 G. 3, c. 93, no bill of exchange or promissory note shall, though it may have been given for an usurious consideration, or upon an usurious contract, be void in the hands of an indorsee for

valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or notice had been originally tainted with usury : see *Holt, C. 257*.

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*Competency of Witnesses.*

To establish usury as a defence, a witness is, in some cases, competent to invalidate his own instrument. Thus, in an action by the indorsee of a bill of exchange against the acceptor, *Lord Kenyon, C. J.* held, that the drawer, when released, was a competent witness to prove that he had given it to the plt. on a usurious consideration: *Rich v. Topping*, Pea. Rep. 224; 1 Esp. Rep. 176; *Brand v. Ackerman*, 5 ib. 119; *Jordaine v. Lashbrooke*, 7 T. R. 601. But, in an action against the acceptor of a bill, accepted for the accommodation of the drawer, the drawer is not a competent witness to prove that the holder came by the bill on a usurious consideration, because he does not stand indifferently liable to the holder and the acceptor: *Jones v. Brook*, 4 Taunt. 464. An attorney who prepares deeds which are granted on a usurious consideration, may be examined by the deft. to prove the usury, as his privilege will not extend to the original formation of the deeds upon which the action was brought: *per Lord Kenyon, C. J., Duffin v. Smith*, Pea. Rep. 108. And, in action by the indorsee against the maker of a promissory note, where usury was set up as a defence, letters may be admitted in evidence from the payee to the maker, stating the usurious consideration between them, it having been shown that the letters were written at the same time with the making of the note: *Kent v. Lowden*, 1 Camp. 177.

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VARIANCES.

A VARIANCE between the proof and the material averments in the pleadings, is, as we have seen throughout the work, fatal to the party pleading, and prevents his succeeding on the trial: see the various titles throughout the work, and wherein the variances in each particular action and defence have been considered. By a late important act, 9 G. 4, c. 15, [see also 3 & 4 Will. 4, c. 42,] brought in by Lord Tenterden, the serious consequences arising from trifling variances on written documents have been avoided. By that act, after reciting that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time;" it is enacted, "that it shall and may be lawful for every court of record, holding pleas in civil actions, any Judge sitting at Nisi Prius, and any court of oyer and \*terminer and general gaol [\*900] delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or Judge shall see fit so to do, to cause the record

on which any trial may be pending before any such Judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such Judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and, in case such trial shall be had at Nisi Prius, the order for the amendment shall be endorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly." See, as to the amendments permitted under this act, *Jelf v. Oriel*, and *Rutherford v. Evans*, 4 C. & P. 23, 74.

[The doctrine of variance between the pleadings and evidence, where the action is on a contract, is stated in *Gwinnet v. Phillips*, 3 T. R. 643, and *King v. Pippet*, 1 T. R. 235. As to variances under the recent Statute of Will. IV., see Chitty on Variances.]

## VENDOR AGAINST VENDEE OF REAL PROPERTY.

As to actions on sales of personal property, see *ante*, "*Goods sold*;" *post*, "*Warranty*."

FORM OF REMEDY AND PLEADINGS,\* 900.

EVIDENCE FOR PLAINTIFF, 902.—*Proof of Contract*, *ib.*—*Performance of Conditions Precedent*, 904.—*Plaintiff's Title*, 905.—*Delivery of Abstract and Tender of Conveyance*, *ib.*—*Breach*, *ib.*—*Damages*, 906.

EVIDENCE FOR DEFENDANT, 906.

FORM OF REMEDY AND PLEADINGS.] The form of remedy against a vendee of real property, for not completing his purchase under an agreement not under seal, is by action of assumpsit, or if under seal, then by action of covenant.

*Declaration.*] The venue in the action is transitory. In an action against a vendee for not completing the purchase by accepting a conveyance, &c., the declaration should be special: see *infra*. It should commence by stating the contract of sale according to such contract: as to how to describe such contract in general, see *ante*, 116 to 121. No more of the conditions of sale than those which are essential to a clear statement of the cause of action and the breach should be stated, for fear of a variance. It is unnecessary to state in the declaration representations contained in the particulars of sale as to the state of repairs, &c., and other collateral matters: *Thompson v. Miles*, 1 Esp. Rep. 184. It is not necessary to state the contract was in writing; according to the Statute of Frauds: *ante*, 117. The situation of the premises should not be too fully stated, 6 East, 348; indeed, it is unnecessary to state it all. Though not always necessary, it is nevertheless, best to state the usual averment of mutual promises: *ante*, 116. It need not be averred deft. performed any part of the

contract. There should be an averment of the performance by plt. of all conditions precedent; otherwise the declaration would be defective, on demurrer, or sometimes after verdict. As to the general rules, showing what are conditions precedent, and how to aver the performance of them, see *ante*, 121 to 130.

It has been said, that plt. ought to aver that he had a title to the estate \*sufficient to complete the purchase, especially if the [\*901] terms of the agreement are, that deft. shall complete it on having a good title, see *Luxton v. Robinson*, Doug. 620, 2 H. Bl. 123; and, where it can be satisfactorily proved he has such title, an averment of it should be introduced in one count. It has been said, that an averment of plt.'s having made it appear to deft. that he had a good title is not sufficient, and that it ought to be stated positively plt. had such title, *Phillips v. Fielding*, 2 H. Bl. 123; but, according to *Martin v. Smith*, 7 East, 555, it would suffice to aver, that a sufficient title was made out according to deft.'s satisfaction: and at all events, the mode in which the plt. derives his title need not be set out. It is not necessary to aver that plt. had the requisite title *at the time of the sale*, as it is sufficient if he had a reasonable time before the day for completion of the conveyance: *Sugden, V. & P.* 210; *Thompson v. Miles*, 2 Esp. Rep. 184; 3 East, 410; 6 *ib.* 535. Where the agreement is, that plt. need not make out his title, and the declaration states that fact, it is not necessary to set forth the title: 8 Taunt. 82. But, without any express stipulation, the vendor, impliedly, contracts to make out a good title, to the amount of the interest he agrees to sell: see 2 W. Bl. R. 1078; 6 B. & C. 33; 7 B. & C. 506. The vendor of a lease does not impliedly engage to have a title to the fee, *Temple v. Brown*, 6 Taunt. 60; nor does he impliedly engage to produce his lessor's title: *George v. Fritchard*, 1 R. & M. 417.

If the plt. were bound to deliver an abstract of title, that fact should be averred and proved, or else some excuse must be shown for the want of it. It seems that, on the sale of a lease, the vendor does not impliedly engage to deliver an abstract of title: *Temple v. Brown*, 6 Taunt. 60. In the absence of any express stipulation to the contrary, the purchaser is bound to prepare and tender the conveyance, *Sugden*, 222, 1 Forrester, 61, 2 Smith, 543; *sed vide* 1 East, 627, 3 Anst. 877, 7 Ves. 278, 8 Taunt. 62; and where the plt. covenanted to sell a house to the deft., and to convey the same before the first of August, and to deliver possession of the same on a previous day, and the deft. on consideration thereof, covenanted to pay the plt. £120 on or before the first pay of August, it was held, that the plt. could not maintain an action for the £120, without averring that he had conveyed, or tendered a conveyance, to the deft.: *Glassebrooke v. Woodrow*, 8 T. R. 366; see also, *Goodison v. Muir*, 4 T. R. 461; *Morton v. Lamb*, 7 *ib.* 129; *Mason v. Corder*, 7 Taunt. 9; 2 Marsh. 332. Where the plt. has executed, or actually tendered, a conveyance to the deft., an averment of such fact should, at all events, be introduced into one count. It seems, however, that it will mostly suffice to aver, that the plt. was ready and willing to convey, and that the deft. refused to accept: 8 Taunt. 62; see further, *ante*, 128, *post*, 905. If the deft. have positively refused to execute or complete the purchase, and discharged the plt. from completing it, that fact should be stated in one count as an excuse for not tendering the conveyance, &c.: see *Jones v. Barclay*, Doug. 684; 5 East, 502; 1 H. Bl. 123. Where A., with the assent of B., agreed to sell the

next presentation to C. and to convey such title as he (A.) had received, in consideration of £7500, of which £500 were to be paid to B. on a certain day, and A. furnished an abstract of such title as he had, but C. refused to take it, and no conveyance was tendered to him, and in an action by B. against C. for the £500, it was held, there was sufficient consideration for C.'s promise to pay it, and that A. was not bound to make a marketable title, but only to convey such as he had received, and that, as C. refused to accept such title, it was not necessary to tender a conveyance: *Wilmot v. Wilkinson*, 6 B. & C. 506. Where, by the terms of the contract, the vendee (deflt.) is to prepare the conveyance, there need be no averment of plt. having tendered it, *Hawkins v. Willock*, 5 East, 198; and, where the conveyance is to be executed at the vendee's expense, he must prepare and tender it: *Seward v. Willock*, 5 [\*902] East, 198; \*and see further, as to when vendor or vendee should prepare the conveyance, *post*, 905.

The damages should be stated according to the facts: and the expenses plt. has been put to, in consequence of deflt.'s failure of performance, should be stated, as they cannot in general, be recovered under the common count for money paid: *ante*, 678, *post*, 911. Where there is a clause at the end of the agreement for stipulated damages, it is, in general, advisable in one count to declare for the same, 6 East, 567, 19 *ib.* 345; otherwise the jury may give less: see *ante*, 149, as to what are stipulated damages.

It is usual to insert the common indebitatus counts for real property bargained and sold; but, according to the case of *James v. Shore*, M. T. 1816, 2 Chit. Pl. 39, *n. a.*; 1 Stark. 426, such counts are not sustainable, and plt. must declare specially, if there has been a resale: *sed vide* 6 B. & C. 373; 5 D. & R. 99. It is therefore, at all events, advisable so to do. It is not necessary to state the local situation of the property, and, if stated, a variance would be fatal: 6 East, 348. A corporation aggregate may support this action: 1 Camp. 466. It may be as well here to observe, that if a conveyance under seal has been granted by plt., wherein he has acknowledged the receipt of the purchase money, he cannot sue at law: *ante*, 43.

*Plea.*] The plea of the general issue will mostly suffice: see *ante*, 138, as to when to plead specially.

*PRECEDENTS.*] See form of declaration by vendor against vendee, for not completing the purchase, and paying the loss on a resale, 2 Chit. Pl. 291; against vendee, on a public house agreement, *ib.*, 296; against vendee, for not taking fixtures, &c., *ib.*, 299; see form of *indebitatus assumpsit* for a freehold estate sold and conveyed, *ib.*, 39; for a copyhold estate surrendered, *ib.*; for a leasehold estate sold and assigned, *ib.*

### *Evidence for Plaintiff.*

The evidence in an action against the vendee of real property for the noncompletion of the purchase, will consist in establishing the contract of purchase, the plt.'s performance of conditions precedent, the deflt.'s breach, and the damages.

*Proof of Contract of Purchase.*] The contract of purchase must be



established. The nature of the proof must depend on the mode in which the contract of sale was effected. Such contract of sale must, according to the Statute of Frauds, 29 Car. 2, c. 3, s. 4, be in writing, signed by the deft. or his agent, that statute enacting that "no action shall be brought whereby to charge a deft. upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement on which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The agreement, therefore, must be produced and proved in the usual way.

This statute extends to all contracts the subject-matter of which partakes of the realty, whether it be of a fee simple, or chattel interest therein: *Inman v. Stamp*, 1 Stark. 12; 5 B. & C. 839. A sale of growing turnips is within the act, *Emmerson v. Heelis*, 2 Taunt. 38; so is a sale of growing grass, *Crosby v. Wadsworth*, 6 East, 602; so is a sale of growing underwood, *Scorell v. Boxall*, 1 Y. & J. 396: but, in sales of such nature where the land, by terms of the contract, is, in effect, *merely a warehouse* for the growing turnips, &c. sold, then the sale is not\* within the act: see *Parker v. Stainland*, 11 East, 362; [\*903] *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 8 D. & R. 611; 5 B. & C. 829, s. c.; *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & R. 224, s. c. The statute, however, does not invalidate an executed parol contract, so as to prevent a party to it from maintaining an action for a breach of it, where the breach does not relate to an interest in land: *Price v. Leyburn*, 1 Gow, 100. And if a party under a void parol contract dig up or remove any growing crops, &c., or fell and remove timber, he will be liable, as for goods sold: *Feall v. Anty*, 4 Moo. 547; *Bragg v. Cole*, *ib.* 114; *Fenning v. Moody*, 3 Bing. 3. A tenant, having agreed with his landlady, that if she would accept another for her tenant in his place (he being restrained from assigning the lease without her consent,) he would pay her £40 out of £100, which he was to receive for the good-will, if her consent were obtained, and, having received the £100 from the new tenant, who was cognisant of this agreement, is liable to the landlady in an action for money had and received for her use, the consideration being executed, and, therefore, the case being taken out of the Statute of Frauds, as a contract for an interest in land: *Griffith v. Young*, 12 East, 513. But, where the plt., having really bargained with J. E. for the sale of some houses, sold the bargain to deft. for £40, and J. E., at the request of deft., conveyed the premises to P., who was not a trustee for deft., a verdict having been found for the plt., in an action for the recovery of this £40, the court refused to enter a nonsuit, which was moved for on the grounds—first, that the oral bargain for the interest in the houses could never have been enforced, and therefore could not for the consideration of assumpsit; secondly, that the house had never been conveyed to the deft.: *Seamen v. Price*, 2 Bing. 437; but see *Bartlett v. Pickersgill*, 4 East, 557, n.

A sale of lands, &c., though by action, is within the statute: *Walker v. Constable*, 1 B. & P. 306, s. c.; 2 Esp. Rep. 659; *Blagden v. Bradbear*, 12 Ves. 466.

We have already seen what is a *sufficient agreement or memorandum or note thereof*, within this action, *ante*, 548; as to how far parol evidence is admissible to explain it, see *ante*, 553; as to stamp, see *ante*, 813.

We have also seen what is a sufficient *signature* of the deft., or who is a sufficient *agent* for him within this section: *ante*, 550-1. The plt. need not have signed, *Egerton v. Matthews*, 6 East, 507, *Allen v. Bennett*, 3 Taunt. 169; but his or his agent's name must appear on the contract: *Wheeler v. Collier*, 2 N. R., 3 C. & P. It is doubted whether, when a contract has been signed by one party only, he is not at liberty to recode from it until the other party has done some act to bind himself: *Martin v. Mitchell*, 2 J. & W. 428. An agreement in the handwriting of the party, beginning, "I, A. B., agree to sell," though not signed by the vendor, is good, within the statute: *Knight v. Crockford*, 1 Esp. Rep. 189. Where both parties gave instructions to an attorney to prepare the conveyance, and the deft. delivered to him the particular, signed by himself, as instructions for the deed, which was accordingly prepared, it was held not sufficient to take it out of the statute, and, being void as to the lands, is void in *toto*: *Cooke v. Tombs*, 2 Anst. 420; and see *Lea v. Barber*, 2 Anst. 425, n. The agent's authority need not be in writing: *ante*, 550. It has been considered that, in a sale of lands, an auctioneer is not an agent for both parties; therefore, his entering the name of the buyer in his book as the purchaser is not a note in writing within the statute, *Stansfield v. Johnson*, 1 Esp. Rep. 101; and see *Walker v. Constable*, 1 B. & P. 306; but, in *Emmerson v. Heelis*, 2 Taunt. 38, it was decided otherwise; and see *Fairbrother v. Prattent*, 1 Dow. 67, 1 Mad. Ch. 374, *Kerneys v. Proctor*, 6 J. & C. 340, where, under a power to trustees to sell, at the request of A., a general consent of the trustees to sell was held not to constitute A. an agent for the trustees to enter into the [\*904] contract, *Mortlock v. Buller*, \*10 Ves. 292; and the authority to a steward to sell, by auction, does not authorize him to sell by private contract: Ambl. 495; see further, *ante*, 550-1.

*Proof of Performance by Plaintiff of Conditions Precedent.*] In framing the evidence under this head, the declaration must be looked to, and all the material averments in it proved.

*Plaintiff's Title.*] We have already seen what averment may be necessary as to plt.'s title and evidence, and should be adduced accordingly. Where the plt. is stated in the declaration to be seized in fee, it will suffice to prove such seizin generally, as *ante*, 729, 457; and he need not show how he deduced his title to the fee: *Martin v. Smith*, 6 East, 555. It has been held by *Ld. Kenyon* to be sufficient to produce the title-deeds at the trial, without proving their execution, *Thompson v. Miles*, 1 Esp. Rep. 184; and he there said, that where the question was respecting a title, he would never allow that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in the case of any purchase, more particularly where possession has accompanied them; but, in a later case, *Mansfield, C. J.* held, at *nisi prius*, that the vendor of the residue of a term, being the third or fourth assignee, was bound to prove all the mesne assignments, *Crosby v. Percy*, 1 Camp. 303; but *Ld. Kenyon's* decision was not cited, see *Sugden's V. & P.*, &c. 216; as to the mode of proving different titles, see *ante*, 457 to 474.

But is it not sufficient for the plt. to show, by mere presumptive evidence, that the premises have been discharged from an incumbrance, to

which they were formerly subject; and, where it was an objection to a title, that it was doubtful whether the wife of a party to a deed, thirty years old, was barred by that deed of her dower, it was held not answered, by proving at the trial, that she was then dead, such proof not having been before given: *Wilde v. Fort*, 4 Taunt. 334. Where a leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidence by any existing deed, but only by the acceptance of a mesne landlord and presumption, it was held that the title was not sufficiently proved, *Barnwell v. Harris*, 1 Taunt. 430; and a purchaser is not bound to rely on the recitals in old deeds, though more than thirty years old, as evidence of a pedigree which is not supported by other proof or by possession accordingly: *Fort v. Clarke*, 1 Russ. 601. But, where a deed, dated sixty years ago, contains a recital of the creation of a mortgage term, and a subsequent assignment of it in trust, to attend the inheritance, and the term is not subsequently noticed in the title, it will be presumed to have been surrendered; and it is no objection to the title that the vendor cannot produce the deed, creating the term or the assignment of it, *Townsend v. Champerecrown*, 1 Y. & J. 538: and see further, *ante*, 460, as to when a surrender of terms is presumed. It is incumbent on the plt., the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment: *Mason v. Corder*, 7 Taunt. 9; 2 Marsh. 332, *s. c.* And it is incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment: *Lloyd v. Crispe*, 5 Taunt. 249.

The plt. must make out a title to all matters sold. Thus, where the particulars of sale state a right of cart-way to be appurtenant to a house, it is sufficient to set out in the declaration so much of the agreement as relates to the house, without stating that part which relates to the cart-way, but still the title to the cart-way must be proved on the trial: *Thomson v. Miles*, 1 Esp. Rep. 184. And, where a party becomes a purchaser of several lots at an auction, it shall be deemed an entire contract;\* and, if the seller fail in making a title to any one of [\*905] them, the party may rescind the contract, and refuse to take the others: *Chambers v. Griffiths*, 1 Esp. Rep. 150; *sed vide* 1 Stark. 26; 2 Taunt. 38; Sugden V. & P. 257. See *post*, 906-7, as to when deft. may object to complete the purchase, on the ground of a misdescription.

It is sufficient for the plt. to prove that he had a good title a reasonable time before the day appointed for the completion of the purchase; he need not have it at the time of the sale, unless there be some stipulation to the contrary, Sugden V. & P. 210; and a deft. who has never applied for a title is not allowed to set up the want of it against the plt., who has obtained one after the commencement of the action: *per Ld. Kenyon*, in *Thomson v. Miles*, 1 Esp. Rep. 184.

With respect to *what title is sufficient* to enable the plt. to support this action. The plt. need not show a better title than what he contracted to give: *Wilnot v. Wilkinson*, 6 B. & C. 506. Without a contract to the contrary, the title must be marketable: *ib.* In a court of law, every title that is not bad is marketable, and sufficient to enable him to maintain this action, *Romilly (Knt.) v. James*, 6 Taunt. 263. A court of law will adjudge a title to be either good or bad, having no middle term for

it: *Maberly v. Robins*, 5 Taunt. 625, *s. c.*; 1 Marsh. 258. If the title be doubtful, the debt will not be liable, as a purchaser is not obliged to accept a conveyance of a doubtful title: *Hartley v. Pehall*, Pea. Rep. 191, *s. p.*; *Wilde v. Fort*, 4 Taunt. 334; *Waring v. Hoggart*, 1 R. & M. 39. A contract to make a good title, means a title good both at law and in equity; therefore, the plt. having only an equitable title will not suffice: *Maberly v. Robins*, 1 Marsh. 258; *Carr v. Baldwin*, 1 Stark. 65. Where the vendor of newly inclosed lands undertook to convey them to the vendee, this was held an undertaking to convey the legal estate, and the vendor having only an equitable interest previous to the assignment by the commissioners, was held not a good title: *Carr v. Baldwin*, 1 Stark. 65. A purchaser may refuse to accept a conveyance executed under a power of attorney: *Coove v. Calloway*, 1 Esp. Rep. 115, Kenyon, *s. p.*; *Richards v. Barton*, 1 Esp. Rep. 268. Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease, for the former differs in value from the latter, the residue of an old term being, in certain respects, more advantageous: *Mason v. Corder*, 7 Taunt. 9. It is a sufficient objection to a title, that a person, under whom the vendors claim, held, during his seizin of the estate, a newly created office under the crown (that of commissioner of Dutch property,) in which he was directed by statute to pay the surplus (after certain charges answered) of the proceeds of certain sales into the Bank of England, there to remain subject to such orders as the king in council should give thereon, and that his accounts with the crown are yet unliquidated: *Wilde v. Fort*, 4 Taunt. 334. The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement, of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he (the purchaser) was ignorant: *Doe d. Bathell v. Martyr*, 1 N. R. 332.

*Delivery of Abstract and Tender of Conveyance.*] This must be proved, as stated in the declaration. We have already seen when the plt. is bound or not to deliver an abstract of title, and tender a conveyance; also, what will excuse his doing it: *ante*, 901. It will suffice to prove that the debt., on a draft being tendered, refused to read it, and discharged the plt. from executing it; it is not incumbent on the plt. to go on and do a nugatory act: see *Jones v. Barkeley*, Doug. 684; *ante*, 901.

*Breach.*] The breach must be proved as stated. The debt.'s neglect or refusal to complete the purchase should be shown.

[\*906] \**Damages.*] These should be proved as stated. If there be stipulated damages agreed on between the parties for the breach of the agreement, they will, if declared for, be recoverable: see *ante*, 149, 902; 6 East, 567; 19 East, 345. If plt. have been put to any expense in endeavouring to get the purchase completed, and that be stated in the declaration, the same should be proved. The amount of the purchase-money remaining unpaid will regulate the estimation of the damages, if the plt. do not declare for stipulated damages. Where there has been a

resale, and the deft. has contracted to pay the amount arising therefrom, such resale should be proved, with the expenses attending it.

### *Evidence for Defendant.*

Under the general issue, the deft. may rebut all the plt.'s proofs, such as the purchase, the title, the tender of conveyance, &c. As to what is a sufficient contract of, within the Statute of Frauds, see *ante*, 902; what a sufficient title, *ante*, 904; and what a sufficient tender, and when necessary to tender a conveyance, &c., *ante*, 901. If the deft. has never applied for a title, he cannot set up the want of it as a defence, where the plt. obtained it after action brought: *Thomson v. Miles*, 1 Esp. Rep. 184. And it seems that no objection can be insisted on at the trial, which was not stated as a reason by deft. for his not completing the contract, if it be of such a nature that it might, if then stated, have been removed: 1 M. & M. 128.

The deft. may show that the property which the plt. is desirous of compelling the deft. to accept a conveyance of, is not that which the plt. contracted to sell. The agreement, or particulars of the property exposed at the sale, will show what property the plt. contracted to sell, and deft. had better be prepared with evidence to show what property the plt. is desirous of making him buy. Thus, it may be shown that the plt. had a shorter interest in the premises than what the contract was for: *Farrar v. Nightingale*, 2 Esp. Rep. 639; *Hibbert v. Shee*, 1 Camp. 113. So, deft. may show that the premises are subject to an incumbrance, or annual payment, of which no notice has been given: *Turner v. Beaurain*, Sugden V. & P. 252; *Barnwell v. Harris*, 1 Taunt. 430. Where leasehold premises are sold by auction, and the lease, containing the usual covenant to repair, is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete his purchase, and might recover back his deposit, although the building pulled down be not described in the particulars of the sale: *Granger v. Worms*, 4 Camp. 83. A slight mistake will not invalidate the sale; thus, a purchaser cannot refuse to perform an agreement for the sale of "the unexpired term of eight years' lease and good-will," on the ground that only seven years and seven months of the term remained: *Behworth v. Hassell*, 4 Camp. 140. A party contracted for an assignment of a lease of a public house, which was described as holden at a certain net rent, upon usual and common covenants. The lease contained a covenant by the tenant to pay land-tax, sewers' rate, and all other taxes, and a proviso for re-entry, if any business but that of a victualler should be carried on in the house, and it was proved that a considerable majority of public-house leases contained such a proviso: it was held that the covenant to pay land-tax, &c. was a common covenant in a lease reserving net rent; and that the proviso for re-entry must, with reference to a lease of a public house, also be considered usual and common: *Bennet v. Womack*, 7 B. & C. 627. The purchaser of an annuity by the Waterloo-Bridge company, and which is described as well secured and payable out of the first tolls received, and is not described as a redeem-

able annuity, cannot afterwards object to the completion of the purchase on the ground of misdescription, provided the annuity has been [\*907] granted in conformity with the act: *Coverly v. Burrell*, \*2 Stark. 295. Where an estate was bought by the deft., upon the terms that all the timber and timber-like trees should be taken at a fair valuation, and he resisted the payment for some pollard trees, it was held that they came under the description of timber-like trees, and that an action would lie for their value: *Rabbett v. Raikes*, Woodf. L. & T. 224.

The deft. may sometimes resist his liability, on the ground of a *fraud* in the misrepresentation, or concealment as to the value, &c. of the property. A mere general misrepresentation as to value, &c., the truth of which the vendee has an opportunity of ascertaining, or the concealment of a matter which an individual possessed of ordinary sense, vigilance, or skill, might discover, cannot, it seems, amount to a fraud sufficient to invalidate the sale. There can be no fraud, if the bargain be a mere and fair contest, or trial of judgment. In all contracts, each party naturally and fairly attempts to obtain an advantage: thus, the vendor endeavours to extol, and the vendee to depreciate; each exercises his own judgment, and neither party can be said to be guilty of a fraud in making bare assertions, upon which the other party probably places no reliance, and which he does not embody in his contract: *Chit. Cont.* 223.

A provision in the conditions of sale, that any misstatement in the particular shall not vitiate the sale, does not extend to a misdescription of the situation, wilfully introduced to increase its apparent value: *Norfolk (Duke of) v. Worthey*, 1 Camp. 340. And, where the particulars described two houses at Nos. 3 and 4, and stated that the taxes of No. 3 were paid by the tenant, and the houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct, and it should have been stated that the taxes of No. 3 were farmed by the landlord; the houses Nos. 2 and 4 were of the same rate, but No. 4 was in the best state of repair: it was held that these descriptions were not cured by the condition, that "if any error or misstatement should be found in the particular, it should not vitiate the sale:" *Leach v. Mullet*, 3 C. & P. 115.

The *employment of puffers* at an auction, not for the defensive purpose of protection against a sale at an under-value, but to extort a high price, by taking advantage of the eagerness of the bidders, will sometimes invalidate the sale, on the ground of fraud, Sugden, V. & P. 118; Cowp. 395; 6 T. R. 642; *Wheeler v. Collier*, 1 M. & M. 123; *Rex v. Marsh*, 3 Young & Jervis, 391; and see *Crowder v. Austin*, 2 C. & P. 208, where it was held, that, under the usual condition, that "the highest bidder shall be the purchaser," a puffer cannot be employed. At all events, no more than one puffer can be employed: *Wheeler v. Collier*, 1 M. & M. 123. In a sale of a horse, where the vendor stationed his servant to join in the bidding at a public auction, and the servant bid up to £29, after a *bona fide* bidder had bid £12, it was held the sale could not be enforced against the vendee: *Crowder v. Austin*, 3 Bing. 368.

## VENDEE AGAINST VENDOR OF REAL PROPERTY.

FORM OF REMEDY AND PLEADINGS, 907.

EVIDENCE FOR PLAINTIFF, 908.—*Under Special Counts, ib.*—*Proof of Contract, ib.*—*Performance of Conditions Precedent, 909.*—*Breach, ib.*—*Damages under a Count for Money had and received, 910.*

EVIDENCE FOR DEFENDANT, 911.

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**FORM OF REMEDY AND PLEADINGS.]** The form of remedy against a vendor of real property, for not completing his sale under an agreement \*not under seal, is by action of assumpsit. If the [\*908] agreement were under seal, then covenant is the proper form of remedy. [If, however, the only object be to recover back the deposit, an action for money had and received may be maintained, although the contract for the sale were under seal. *Greville v. Da Costa*, Peake's Add. Cas. 113.]

**Declaration.]** The venue is transitory. The plt. may either declare specially on the contract to recover damages for the breach of it, or simply for money had and received, to recover back the deposit or purchase money; or, as is most usual and advisable, he may join both causes of action in the same declaration. It is absolutely necessary to declare specially, when there has been a part execution of the contract, insomuch so, that it cannot be wholly rescinded, so as to place the vendor in *statu quo*; as, where the vendee has taken possession of the premises, or the like, *Hunt v. Silk*, 5 East, 449, *Squire v. Tbd*, 1 Camp. 293, 2 Burr. 1011; or when the vendee has neglected to rescind it, as he ought to do, in a reasonable time; and it is necessary to declare specially for the recovery of any expenses, *Hureau v. Thornhill*, 2 H. Bl. 1078, *Richards v. Barton*, 1 Esp. Rep. 268, *Camfield v. Gilbert*, 4 Esp. Rep. 221, or other damages or interest: 4 Esp. Rep. 223; 3 Camp. 258; 1 Marsh. 260; 7 Taunt. 592; 1 Moo. 822, *s. c.*; 8 Taunt. 45; 1 B. & P. 306. [And, under a special declaration, the executor of a vendee may recover interest and the deposit money and the expense of investigating the title where the vendor has not made out a good title within the stipulated time: *Orme v. Broughton*, 10 Bing. 533.] Where there has been no payment of a deposit or purchase-money, of course the plt. must declare specially. The common count for money had and received, will suffice to recover back simply the deposit, or purchase-money, whether plt. rescind the contract, on the ground of deft.'s not completing it, or for fraud, &c. The common count alone will avail the plt., if there was no agreement signed by the deft. within the Statute of Frauds, see *Adams v. Fairban*, 2 Stark. 277; or in an action against an auctioneer, when he is liable only to repay the deposit as an agent, and not as a principal, *infra*; or when both plt. and deft. have made default: *Clarke v. King*, 1 R. & M. 394. The observations already made as to the *mode* of declaring specially, in an action by the vendor, will apply here, *mutatis mutandis: ante*, 900-1-2.

*Plea.*] The plea of the general issue will, in most cases, suffice. As to when to plead specially, *ante*, 138.

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### *Precedents.*

See form of declaration against the vendor of an estate at public auction, for not making out a good title, and for not delivering an abstract of title, 2 Chit. Pl. 287; also, against a publican, on an agreement to assign his lease on the implied agreement for title, *ib.* 290.

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### *Evidence for Plaintiff.*

UNDER SPECIAL COUNTS.] Under the special counts, the plt. must establish all the material facts set forth therein: viz. the contract between plt. and deft., the plt.'s performance of conditions precedent, the deft.'s breach, and the damages.

*Proof of Contract between Plaintiff and Defendant.*] The contract, in writing, must be established in the same way, *mutatis mutandis*, as in an action by the vendor against vendee; as to which, see *ante*, 902-3.

This action may be maintained by the principal, although his agent made the purchase, and signed the contract in his own name, and was considered to be the principal by the vendor: *The Duke of Norfolk v. Worthy*, 1 Camp. 337; see *Edden v. Read*, 3 Camp. 338. So, one who has signed the contract as agent for another, may maintain the action against the vendor, where the contract is rescindable, if the principal has denied that he gave authority, and had repudiated the contract: *Langstroth v. Toulmin*, 3 Stark. 145. See further, as to when an [\*909] agent may sue, *ante*, 61. Where an auctioneer, who signed the contract, did not describe the name of his principal, and the plt. did not know who the principal was, the auctioneer will be liable as principal: *Hanson v. Roberdeau*, Pea. Rep. 120; and see *ante*, 72, as to when an agent may be sued; and *post*, 910, as to when he may be sued for the deposit.

*Proof of Performance of Conditions Precedent.*] All that is necessary by the terms of the contract to be done by plt., before he can sue the deft. specially for the breach of it, must be averred in the declaration, and proved accordingly. We have seen where the vendee is bound to tender a conveyance, *ante*, 901; if he can prove deft.'s defect of title, there would be no necessity for him to tender it, *Lowndes v. Bray*, Sugden's V. & P. 223; and, where the deft. has, by selling the estate, incapacitated himself from executing a conveyance to the plt., an allegation and proof to that effect could dispense with proof of a tender of the conveyance of purchase-money, *Knight v. Rochford*, 1 Esp. Rep. 189: and so an allegation and proof, that deft. in every respect refused to complete the purchase, would dispense with the proof of the performance of conditions precedent: *semb. Jones v. Barkeley*, 2 Doug. 684.

*Proof of Breach.*] This must be proved, substantially, as alleged. If



the action be for not furnishing an abstract of title, according to the agreement, slight evidence of deft.'s neglect must be adduced: and, if any demand for it has been made, as it generally should be, such demand should be proved, as well as deft.'s refusal.

If the breach be for a defective title, such defect must be fully proved as stated. It is not sufficient to prove the mere opinions of conveyancers: *Camfield v. Gilbert*, 4 Esp. Rep. 221. We have already seen what title is sufficient, *ante*, 904-5, as also when deft. should obtain it, *ante*, 905. If the vendor conditions to make out a good title by a certain day, the vendee is not bound to apply to the vendor respecting it, before that day; and, in an action for money had and received, entitled to recover each his deposit: *Berry v. Young*, 2 Esp. Rep. 640, n.

The deft., by a judge's order, may obtain a particular of the grounds on which the plt. seeks to recover back the deposit, to which the latter will be confined at the trial, *Squire v. Todd*, 1 Camp. 293, *Collett v. Thompson*, 3 B. & P. 246; but he is not bound to state any objection in point of law, arising from the abstract: *ib.* If there has been no particular obtained, the plt. may entitle himself to a verdict, by proving an infraction of the conditions of sale never before mentioned to the deft.: *ib.*

*Damages.*] The plt. is entitled to recover, as damages, if stated in the declaration, not only the amount of his deposit, but also interest upon it, and even interest on the residue of the purchase-money, which has been lying ready to be paid, without making interest: *Flureau v. Thornhill*, 2 W. Bl. 1078. It seems, he may also recover the expenses incurred in investigating the title, *Kirtland v. Pounsett*, 2 Taunt. 145, *Turner v. Beaurain*, 3 Stark. Ev. 1613, and endeavouring to complete the conveyance, as the expenses of the conveyance, &c.: *Richards v. Barton*, 1 Esp. Rep. 268; *Coore v. Callaway*, 1 Esp. Rep. 115. A contractor for the purchase of a real estate, to which the title proves (without collusion) defective, is entitled to no satisfaction for the loss of his bargain: *Flureau v. Thornhill*, 2 W. Bl. 1078. And though the action be brought against an agent who sold without sufficient authority, the plt. may recover the costs of a suit against the principal, for a specific performance: *Jones v. Dyke*, Sugden's V. & P. App. No. 8. Where the vendee relies on a defect in the vendor's title, which was an equitable one, and no fraud is imputable to the vendor, the plt. does not usually recover more than nominal damages; see 3 B. & P. \*107; *Flureau v. Thornhill*, 2 W. Bl. 1078: [This doctrine of *Flureau v. Thornhill*, came under the consideration of the K. B. in the recent case of *Hopkins v. Grazebrook*, 9 D. & R. 22; 6 B. & C. 31: in which it was determined, that a vendor contracting to sell an estate with a good title, when he has only an equitable title, and is not in possession, and failing in his contract by the time stipulated, is liable to more than nominal damages, for the breach of the contract, in addition to the expenses incurred by the purchaser:] *Brigg's case*, Palm, 364; *Bratt v. Ellis*, Sugden's V. & P. App. No. 7. But, where the vendee had no title whatever to sell, or was guilty of a fraud, it seems some damages would be given for the loss of the bargain; and, where the deft., a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale, in lots, by auction, and engaged to make a good title, by a certain day, which he was unable to do, as his vendor never made a

conveyance to him, it was held, that the plt., a purchaser of certain lots at the auction, might, in an action for not making out a good title, recover, not only the expenses which he had incurred, but also damages for the loss which he had sustained by reason of not having the contract completed, *Hopkins v. Grazebrook*, 6 B. & C. 91; as to stipulated damages, see *ante*, 149; and competent witnesses should be subpoenaed to support and prove the damages.

*Under COUNTS FOR MONEY HAD AND RECEIVED.*] In support of this action to recover back the deposit or purchase-money, where the plt. has rescinded the contract, on the ground of deft.'s not completing it, he should be prepared to prove the receipt of the money by deft., as *ante*, 718, 749; the contract between them, as *ante*, 902-8; the plt.'s performance of all conditions precedent, as *ante*, 909; deft.'s breach, as *ante*, 909; and the plt.'s rescinding of the contract. Such rescinding must be proved to have been put in force by plt. in due time, and the agreement must be rescinded *in toto*. It must not appear that deft. cannot be put in the same situation as he was in, as far as respects the contract, at the time of entering into it; and, if the plt. has had the occupation of the premises, for any time, under the contract, or the like, he cannot afterwards rescind it, and his only remedy would be for the breach of the contract, and not to recover the deposit: *ante*, 908. A bankrupt's assignees had contracted for the sale of his copyhold lands, and received a deposit; the commission was afterwards superseded, because, when it issued, the petitioning creditor's debt was not due. Another commission issued, upon the petition of another creditor, and the same assignees were chosen; it was held, that the plt., having abandoned his contract, pending the old commission, might recover back his deposit: *Bartlett v. Tuchin*, 6 Taunt. 259, *s. c.*; 1 Marsh. 583.

When the plt. seeks to recover back the money, on the ground of fraud or misrepresentation, &c., he should prove the receipt of the money by deft., and the fraud, &c. As to what is a sufficient fraud or misrepresentation, &c., see *ante*, 907.

When the plt. seeks to recover back the money, on the ground of the agreement not having been duly signed by him or his agent, or being otherwise bad, on account of the Statute of Frauds, he should prove the receipt of the money by deft., and the defective agreement. The purchaser may recover the deposit, as money had and received to his use, though the agreement for sale be unsigned and unstamped: *Adams v. Fairbairn*, 2 Stark. 277; *ante*, 908.

An auctioneer is considered as a stakeholder, and should not part with the deposit, until the sale has been carried into effect, *Burrough v. Skinner*, 5 Burr. 2639; *Bery v. Young*, 2 Esp. Rep. 640, *Spurrier v. Elderton*, 5 Esp. Rep. 1; and he cannot discharge himself, by paying over the amount to the vendor: *Jones v. Edney*, Sugden's V. & P. 37, *cor. Ld. Ellenborough*, 1812. At all events, he cannot do so after notice. An attorney, who was also an auctioneer, received a deposit on property which he had sold by auction, and, after queries raised on the title, and before they were cleared, paid over the deposit to his principal. On a demand of the deposit by the buyer, he answered, that his principals would not consent to return it, and would enforce the contract: it was held that the buyer might recover the deposit from the auctioneer, as money had and received to the plt.'s use, because the deft. as attor-

ney, had notice\* that the title had not been completed before he paid over the money, and because he misled the plt. to sue himself, by not saying he had paid it over: *Edwards v. Hodding*, 5 Taunt. 815. If an auctioneer sign a contract for the sale of a house, in his own name, and receive the deposit (his principal being present,) and, after the purchaser has left the room, pay over the deposit to such principal, the purchaser may, notwithstanding this, maintain an action against the auctioneer to recover back the deposit, if a good title cannot be made out: *Gray v. Gutteridge*, 3 C. & P. 40.

In this action, under the common counts, the plt. cannot recover more than the mere deposit. Expenses are not recoverable, nor interest: *Walker v. Constable*, 1 B. & P. 306; *Tappendale v. Randall*, 2 B. & P. 472; *Marshal v. Poole*, 13 East, 100; *Camfield v. Gilbert*, 4 Esp. Rep. 221. But, under particular circumstances, interest might be given, in the nature of damages. As, where it is proved that the deft. has made use of the money, or has positively refused to deliver it up, &c.: see *Lee v. Nunn*, 8 Taunt. 45; *Farquhar v. Farley*, 7 Taunt. 594.

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#### *Evidence for Defendant.*

The deft. may under the general issue, rebut the plt.'s proofs, either in denying the contract, the receipt of the purchase money, the performance of the conditions precedent, the breach, or the like. As to proving the goodness of the deft.'s title, see *ante*, 904-5. If particulars of the defects intended to be set up have been obtained, deft. should be prepared to prove such particulars, as, *ante*, 700, and plt. cannot travel out of them: *ante*, 909. As to when deft. may show he has paid over the deposit, *ante*, 75, 672. In an action by the vendee, on an agreement for the purchase of a public house, with mutual stipulations, and liquidated damages for non-performance, where both parties have made default under the agreement, the circumstance of plt. having made such default furnishes no answer to the action: *Clarke v. King*, 1 R. & M. 394. In such case it is incumbent on the deft. to show that, when the deposit was demanded by the plt., he tendered an assignment of the lease: *ib.*

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#### VENUE.

See the various titles of actions throughout the work.

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#### VERDICT.

**EFFECT OF VERDICT.]** Where there is any defect or omission in any pleading, whether in substance or form, as necessarily required on the trial, it will, in general, be aided by verdict. Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as is necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted and without which it is not to

be presumed that either the Judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by verdict: 1 Saund. 228, *a*. Thus, in *assumpsit*, for not delivering a quantity of malt, it was averred that the plt. was ready and willing to pay the same, but it was omitted to state that he offered to do so: the omission was held to be cured by verdict: 1 East, 203. But, if the consideration for the promise be omitted, it will not be cured by [\*912] verdict: 1 Salk. 364. The various instances will be found fully stated in the respective parts of the pleadings throughout the work. [The jury are not bound to any other than a general verdict, although directed by the judge trying the cause to find specially as to a particular fact, on which a legal question may be raised; and where they refused, the court would not disturb their verdict: *Devizes, Mayor, v. Clark*, 3 Adol. & Ell. 506.]

**PROOF OF.]** To prove a verdict, an examined copy of the whole record must be given in evidence, B. N. P. 234, *ante*, 755, as it might not otherwise appear that the judgment had been arrested or a new trial granted, though such were the case: *ib*. But it is otherwise where the verdict is on an issue out of chancery, as it is unusual to enter judgment in such a case; and the decree of the Court of Chancery is equally proof that the verdict was satisfactory and conclusive: *ib*. Where it is required merely to prove that a trial was had between the parties, *Pitton v. Walter*, 1 Str. 162, or even the amount of the damages, the *nisi prius* record, with the *postea* endorsed upon it, is sufficient evidence for that purpose: *Foster v. Compton*, 2 Stark. 364. A verdict on a former trial is not evidence on a new trial: 2 Show. 255. It cannot be shown that a verdict was improperly entered, as the record is conclusive as to the fact of finding: *Reed v. Jackson*, 1 East, 355. And it has been held that the production of the *postea* in a former cause, between the same parties, was sufficient to support a plea of set-off, to the extent of the verdict: *Garland v. Scones*, 2 Esp. Rep. 648. A former verdict may be given in evidence in a second action between the same parties, *ante*, 611; as to when it is admissible in an action between other parties, *ante*, 612. Where a right is claimed by prescription, as for tolls, for fairs, markets, &c. a verdict found as to the right, though the trial has been between other parties, is evidence, Carth. 181, B. N. P. 233; for the custom or tolls is *lex loci*, and it is as reasonable to give in evidence a verdict between other parties as to prove a payment of the duty by strangers. So, it is admissible on a question of customary right of common, 1 East, 337, 5 T. R. 413, *n*.; or a public right of way, *Reed v. Jackson*, 1 East, 355; or respecting a right to passage-money over an ancient ferry, *Tripp v. Frank*, 4 T. R. 666; or on the liability to repair a highway, *R. v. St. Pancras*, Pea. Rep. 219; or on manorial or other customs, Carth. 181, case of the Manchester mills, cited in *Cort v. Birkbeck*, 1 Doug. 222, *n*. (13); or on the public right of election to a parochial office, *Berry v. Bonner*, Pea. Rep. 156; for, as the common reputation of the place would be evidence of the right, *a fortiori*, the finding of a jury upon their oaths is evidence: by *Lawrence, J.*, 1 East, 357; Gilb. 31. Therefore, on these questions, a verdict, in an action between A. and B., is evidence of the point there directly determined; in an action between C. and D., where the same point comes in issue, it is not, however, conclusive: *Biddulph v. Ather*, 2 Wils. 23.

And it seems not to be conclusive evidence for or against A. or B., in an action between either of them, and a third person, C.: see the cases above cited; and see *Mayor of Hull v. Horner*, Cowp. 111, *ad. fin.* It could not be pleaded, in such a case, by way of estoppel: 1 Phil. Ev. 311. Where, however, in an action, a question has been raised as to pedigree, and that not even between parties, but by strangers to those then litigating, and a special verdict be found, stating the pedigree of the family, it would be evidence of the descent: B. N. P. 233.

VICAR, *ante*, 845, 847.—VOLUNTARY CONVEYANCE, *ante*, 528.—VOLUNTARY PREFERENCE, *ante*, 228.

## \*WARRANTY, ACTION FOR.

[\*913]

FORM OF REMEDY, 913.

FORM OF PLEADINGS, *ib.*

PRECEDENTS, 914.

EVIDENCE FOR PLAINTIFF, *ib.*

**FORM OF REMEDY.]** Assumpsit is the proper remedy upon an express warranty of the goodness or quality of any personal chattel, either on the sale or exchange thereof, 1 Chit. Pl. 115; or upon an express or implied warranty as to the property therein: 2 Bl. C. 451; 3 *ib.* 160. An action on the case was formerly the remedy generally adopted; of late, however, assumpsit is more usual, for the purpose of joining counts, for horse-meat, money paid, and money had and received, &c.: 2 East, 451-2. And at present, where there was no warranty, but a written contract and a false representation, case is the proper remedy, 4 Camp. 22, 12 East, 11; and, in some cases, though there be a warranty and stipulation that the vendor will take the article back, yet the vendee may sue for the deceit: *Wallace v. Jarman*, 2 Stark. 162.

[Where an unsound horse is sold, with a warranty of soundness, the buyer may sue on the warranty, although shortly after the sale he discovers the unsoundness, and without giving notice of that fact to the seller, keeps and uses the horse as his own for months, and during that time administers physic to it, and uses other means to cure it: *Patteshal v. Tranter*, 4 Nev. & Man. 650.]

**FORM OF PLEADINGS.]** The venue is transitory. In declaring on a warranty, where the contract is still open and unrescinded, the plt. must declare specially upon the warranty; and he cannot recover back the price, or a part of it, on the common counts for money had and received, as the contract has not been put an end to: *Payne v. Whale*, 7 East, 274; *ante*, 673, 910. But where, by the contract, the purchaser has the power of rescinding the contract, by returning the chattel, as in the case of a horse,

if he prove unsound, and does it, or offers to do it, the contract is at an end, and he may recover for money had and received: *Towers v. Barrett*, 1 T. R. 133. The contract cannot be rescinded unless the vendor (deft.) can be put in *statu quo*, or, in other words, in the same situation, as far as respects the plt.'s contract, as he was in when such contract was entered into. Therefore, the contract cannot be rescinded, if the plt. has kept the horse an unreasonable time, or in anywise injured it, by hard riding, doctoring, &c.: 1 T. R. 136; 5 East, 449; 7 East, 274; 2 Camp. 410; 1 Moo. 106.

The contract of sale must be stated accurately. If an agent sell to A. two horses belonging to B. and C., and warrant them, it must not be declared on as the sale of one horse only, the contract being entire: *Symonds v. Carr*. 1 Camp. 361. If the price were to be returned on a certain event, such fact should be stated accordingly: 1 Bing. 472. If the deft. took another horse in part payment, it is no variance to state that the whole price was paid in money: *Hands v. Burton*, 9 East, 349; S. N. P. 630; *ante*, 534. If the warranty be not general, but restrained by an exception, as is the case of horses of a particular unsoundness, the declaration must state the qualification, of the warranty, or it will be objectionable as a ground of variance: 4 B. & C. 446; 6 D. & R. 533. Where the plt. declared on a warranty that the horse was sound, and the warranty proved was, that the horse was sound every where except a kick on the leg, it was held to be a variance: *Jones v. Cowley*, 4 B. & C. 445; and see 2 D. & R. 10; 7 Taunt. 409; 1 Moo. 109. Where the deft. took another horse in part payment, it will be no variance to state that the whole price was paid in money: *Hands v. Burton*, 9 East, 349; Selw. N. P. 630. But, if an agent sell to A. two horses belonging to B. and C., and warrant them, A. must not declare upon the sale of one horse, the contract being entire: *Symonds v. Carr*. 1 Camp. 361. In an action of assumpsit upon an express warranty, the *scienter* need [\*914] not \*be alleged, nor, if alleged, need it be proved: 2 East, 466. The breach stated must be co-extensive with the contract of warranty: *ante*, 133—4—5. The breach may be in the negative of the words of the contract; the particular description of unsoundness, &c. need not be stated, though it is, in some cases, usual to do so: Com. D. *Pleader*, C. 45; 2 Saund. 181, *b.*; 3 T. R. 307. As to the damages, and what recoverable, see *post*, 917. It is necessary to state the damages as to horse-keep, &c. specially.

*Plea.*] The plea of the general issue will suffice to put the plt. upon proof of all material facts stated in the declaration: as to when to plead specially, see *ante*, 138.

### Precedents.

#### DECLARATION IN ASSUMPSIT, ON A WARRANTY OF A HORSE.

For that whereas, heretofore, to wit, on, &c. (*the day of sale, or about it*) at, &c. (*venue*) in consideration that the said plt., at the special instance and request of the said deft., would buy of him, the said deft., a certain mare, at and for a certain price or sum of money, to wit, the sum of £—, to be therefore paid by him, the said plt., he, the said deft., undertook, and then and there faithfully promised the said plt., that the said mare then was sound, (*according to the warranty*;) and the said plt. avers, that he, considering

in the said promise and undertaking of the said deft., did afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, buy the said mare of the said deft., and then and there paid him for the same the said sum of £—. Nevertheless, the said deft., contriving and fraudulently intending to injure the said plt., did not perform or regard his said promise and undertaking so by him made, as aforesaid, but thereby craftily and subtly deceived and defrauded the said plt. in this, to wit, that the said mare, at the time of the said promise and undertaking of the said deft., was not sound (*according to the warranty*;) but, on the contrary thereof, was at that time unsound, whereby the said mare became and was of no use or value to the said plt.; and he, the said plt. hath been put to great charges and expense of his monies in and about the feeding, keeping, and taking care of the said mare, in the whole amounting to a large sum of money, to wit, the sum of £—, to wit, at, &c. aforesaid. (*Add a count on an executed consideration, and the common counts.*)

### *Evidence for Plaintiff.*

[**UNDER SPECIAL COUNT.]** In support of a special count for the breach of warranty, the plt. must prove the contract between the plt. and deft., the warranty, the performance of conditions precedent, the breach, and the loss or damage.

[**Proof of Contract between Plaintiff and Defendant.]** This is usually proved by the receipt, *ante*, 749, 821, or some agreement, or memorandum or note, of the bargain in writing. The deft.'s signature thereto should be proved. As to proving a contract of sale in general, see *ante*, 535, 540. The contract must be proved as stated: as to what a variance, *ante*, 913.

[**Proof of Warranty.]** An *express* warranty must be proved. And, though the vendor of personalty impliedly warrants that he has a title enabling him to sell, Cro. J. 474, yet a warranty as to the quality of the goods is not implied by a price, however high: *Parkinson v. Lee*, 2 East, 322. But, where on the sale of goods the party had no opportunity of inspecting them, a warranty that they are of a merchantable quality will be implied, as in the case of goods which are to be manufactured, or are on their passage from the continent: 4 Camp. 144; *id.* 169; 6 Taunt. 108; 4 B. & C. 111; 6 D. & R. 203. And so it would seem, that, where \*a person sells a thing for a particular purpose, that he [\*915] must be understood to warrant it fit and proper for such purpose: 4 B. & C. 115; 6 D. & R. 200. \* The general rule is, that whatever a seller represents at the time of sale is a warranty. A warranty may be either general or qualified. If a person at the time of selling his horse say, "I never warrant, but he is sound so far as I know," this is a qualified warranty, and the purchaser may maintain *assumpsit* upon it, if he can show that the horse was unsound to the knowledge of the seller: *Wood v. Smith*, 4 C. & P. 45. A sale of goods by sample, is, in effect, a sale by warranty, and proof of that fact is evidence of a warranty: *Parker v. Palmer*, 4 B. & A. 387. And the custom of a particular trade may be given in evidence to prove a warranty, as it will be presumed that the custom regulated the parties. Thus, in an action on the sale of sheep, sold as stock, and it was proved that, by the custom of the trade, stock was understood to be sheep that were sound, it was held that they were sold under a warranty to that effect: *per Heath, J.*, 4 Taunt. 853. Where

the plt. wrote to the deft., "You will remember that you warranted a horse to me as a five-year-old," &c.; to which the deft. replied, "the horse is as I represented it," it was held sufficient from which to infer a warranty: *Salmon v. Ward*, 2 C. & P. 211. The printed conditions of a sale, posted up under the auctioneer's box, may be given in evidence to prove a warranty: *Mesnard v. Aldridge*, 3 Esp. Rep. 271. A written receipt for the price, containing the warranty, is admissible in evidence of the warranty, though stamped as a common receipt, without an agreement stamp: *Skrine v. Elmore*, 2 Camp. 407; 2 Phil. Ev. 113; *ante*, 821.

A warranty must appear to have been given either at or previous to the sale, as a warranty after the thing is sold is void for want of consideration: 3 Bl. C. 166.

To prove a warranty, it will be insufficient to show a simple affirmation or assertion by the vendor, as to the value or quality of the goods, unless it be made and received as a warranty: Cro. J., 4; *Pickering v. Dawson*, 4 Taunt. 799. Thus, where the deft., not knowing the age of a horse, but having a written pedigree, which he received with him, sold him as a horse of the age stated in such pedigree, and at the time mentioned that it was his only source of information, it was held not to amount to a warranty: *Dunlop v. Waugh*, Pea. Rep. 123; and so in the case of the sale of pictures, which are represented to be by old masters, if such fact had been previously stated in catalogues, &c.: *Jewdine v. Slade*, *ib.*, n. (A.); 2 Esp. Rep. 572. But a description in an advertisement will amount to a warranty. Thus, where an advertisement for the sale of a ship, described her as a "copper-fastened vessel," adding that the vessel was to be taken with all faults, without allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened, it was held that, notwithstanding the words "with all faults," &c. the vendor was liable for the breach of the warranty: *Shepherd v. Rain*, 5 B. & A. 240. Where the seller informed the buyer that one of two horses he was about to sell him, had a cold, but he agreed to deliver both at the end of a fortnight, "sound, and free from blemish," and at the expiration of that time the horses were delivered, but the cough on the one still continued, and the other had a swelled leg, in consequence of a kick he had received in the stable, and the seller brought an action to recover the price, the jury found a verdict for the purchaser; the court refused to grant a new trial, as the warranty did not apply to the time of the sale only, but was a continuing warranty to the end of the fortnight: *Liddard v. Kain*, 2 Bing. 183; 9 Moo. 356, s. c.

Where an express written warranty has been given, the vendee cannot give in evidence any representations not embodied in the contract, and made by the vendor without fraud, 4 Taunt. 779, 2 B. & C. 634, 4 D. & R. 52; and, if an express warranty be proved, deft. will not be allowed to show that the goods were sold by sample, and that they corresponded with it: 3 Camp. 462. And, where there is an express warranty, it cannot be restrained or varied by proof of the custom of any particular trade: 1 Holt. C. 95; 6 Taunt. 446. And where a general warranty of a horse is proved by parol, (the written contract for the sale not being forthcoming,) the fact that the witnesses who proved it saw a notice [916] board on\* the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action,



but it will be left to the jury to say whether this formed part of the original contract; *Best v. Osborne*, 2 C. & P. 74.

A general warranty will not extend to protect against plain and obvious defects, as where a horse is warranted perfect, and wants an ear or tail, &c. 2 Bl. C. 165; unless where the horse is to be delivered at the expiration of the specified time: *Liddard v. Kain*, 2 Bing. 183; 9 Moo. 356; s. c.; *ante*, 915.

Where it appears that a servant is employed to sell a horse, he has an implied authority to warrant that he is sound, and the master will be bound, *Alexander v. Gibson*, 2 Camp. 556; and even though it appear that the servant had express directions not to warrant, yet if he do warrant, it would seem that the master is bound, if the servant belong to a person as a horsedealer, and may be supposed to possess a general authority, &c. and therefore appears to be in a condition to warrant: *Pickering v. Buck*, 15 East, 45; 5 Esp. Rep. 75; 1 Dow, 45.

*Proof of Performance of Conditions Precedent.*] If there be any conditions precedent to be performed by the plt., the same should be proved as averred in the declaration. The payment of the price, or its equivalent, is usually proved: *ante*, "Payment," "Receipt." Where an express warranty is complied with, on an undertaking to take the article sold again and pay back the money if it shall be found defective *on trial*, in such case the purchaser must return the article as soon as he discovers its defects, to enable him to sue on the warranty, unless he has been induced to prolong the time of trial by some subsequent representation of the vendor: 2 H. Bl. 573.

*Breach of the Warranty.*] It is necessary for the plt., in an action on a warranty to prove clearly and positively the breach of it at the time of such warranty, *Eaves v. Dixon*, 2 Taunt, 343, 2 Stark. 127; and, in case of the breach of the warranty on the sale of a horse, it must be proved that he was unsound at the time of the sale, and it will not be enough to show that there was an opinion merely of his unsoundness: *ib.* But, where certain sheep, apparently healthy and sound in every respect, were sold warranted sound, and two months afterwards great part of them died, and there was nothing to connect the disease of which they died with their previous condition, but it was, in the opinion of farmers and breeders, an hereditary disease called the goggles, and incapable of discovery until its fatal appearance: it was held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion that "it existed in the constitution of the sheep at that time:" *Joliff v. Bendell*, R. & M. 136.

As to what constitutes unsoundness in horses, it seems, any infirmity which renders them less fit for present use and convenience is an unsoundness, nor is it necessary that it should be of a permanent nature: *Elton v. Jordan*, 1 Stark. 127. And where, in an action on the warranty of a horse, the plt. has obtained a verdict, the court will not grant a new trial, on the grounds that there was no known disease to constitute such an unsoundness, as set up by the plt., or that the deft. was taken by surprise, although the plt., on application, had refused to inform him of the cause or nature of the unsoundness: *Atterbury v. Fairmanner*, 8 Moo. 32. As to the diseases which constitute an unsoundness, it seems that a nerved horse is unsound: *Best v. Osborne*, R. & M. 290. A cough which is of

a permanent nature is also an unsoundness, *Shilletoe v. Claridge* 2 Chit. Rep. 425; but it seems doubtful whether thrushes, splints, or grinding, constitute unsoundness: 2 Camp. 524, *n.* Roaring is said not necessarily to be an unsoundness, *Besset v. Collis*, 2 Camp. 523; but be-  
 [\*917] comes so, if the horse is \*thereby rendered less serviceable for a permanency: *Onslow v. Eames*, 2 Stark. 81. Crib-biting is not such an unsoundness as to entitle a purchaser who has bought under a general warranty, to recover for a breach of it: *Broennenburgh v. Haycock*, Holt. C. 630. The question of soundness or unsoundness is entirely for the consideration of the jury, and therefore a verdict will not be set aside on account of a preponderance of contrary evidence, *Lewis v. Peake*, 7 Taunt. 153; or on the ground that the deft. has been taken by surprise, as to the nature of the unsoundness proved: *Atterbury v. Fairmanner*, 8 Moo. 32.

*Damages.*] It is not essential, to enable the vendee to bring an action for the breach of an express warranty, to tender a return of goods, 1 H. B. 17, 2 T. R. 745; and, where there has been no offer to return, the measure of damages is merely the difference between the sum given and the real value: *Caswell v. Coare*, 1 Taunt. 566; 3 Stark. 32. If a horse or goods are not tendered to the vendor, the purchaser can recover no damages for the expense of keeping, *ib.*; but, where an offer to return is made within a reasonable time, the seller must take the goods back, or they remain at his risk: 1 Stark. 107. But it has been held, that, where plt. proceeded in assumpsit for the breach of warranty of soundness of a horse, the deft. having refused to take back the horse, the plt. is entitled to recover for the keep of such time only as would be required to resell the horse to the best advantage: *McKenzie v. Hancock*, R. & M. 436. Where the vendor rescinds the contract, he is liable for the keep of a horse, from the time of the contract: *King v. Price*, 2 Chit. Rep. 416. Where A. warranted a horse to B., who resold him with a warranty to C., and, the horse proving unsound, C. sued B., who gave A. notice of the action, and offered him the option of defending it, but, A. not returning any answer, B. defended the action, and failed; it was held, that A. was liable, in an action on the warranty, for the costs of the action brought by C. against B.: *Lewis v. Peake*, 7 Taunt. 153; and see *ante*, 909.

*Proof under Common Count for MONEY HAD AND RECEIVED.*] In support of this count to recover back the price paid for the unsound article, the plt. should be prepared to prove the deft.'s receipt of the money, as *ante*, 718, 749; the contract and warranty, as *ante*, 914; the deft.'s breach of it, as *ante*, 915; and the plt.'s rescinding of such contract by having returned, or offered to return, the article to deft. within a reasonable time after the sale, uninjured in any way: so as deft. cannot be placed in *statu quo*, the plt. cannot, under the common counts, recover more than the mere price paid; expenses of horsekeep, &c., are not recoverable, nor is interest: *Walker v. Constable*, 1 B. & P. 306; 2 B. & P. 472.

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#### *Evidence for Defendant.*

The evidence for deft. will consist in rebutting the plt.'s proofs as to the contract of warranty, the breach of it, or the like. If he plead spe-

cially he must be prepared to prove the issue taken on it: see the various titles of defences throughout the work.

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*Competency of Witnesses.*

A former owner of a horse, who has sold him with a warranty to the plt., is a competent witness, for the deft., to prove that the horse was sound at the time of the sale by him; for it does not appear that the horse was unsound at the time, and, unless it were, the witness would not be liable to the deft. *Briggs v. Crick*, 2 Esp. Rep. 99; but see 2 Phil. Ev. 114; but this would seem to be doubtful.

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\*WAY, ACTION FOR DISTURBANCE OF.

[\*918]

FORM OF REMEDY AND PLEADINGS, 918.

PRECEDENTS, 920.

EVIDENCE FOR PLAINTIFF, *ib.*

*Of PUBLIC Way, ib.—By act of Parliament, ib.—By Prescription, 921.—By Dedication, ib.*

*Of PRIVATE Way, 922.—By Grant, ib.—By Prescription, 923.—By Necessity, 924.*

*Proof of the Way as stated, ib.—Proof of Obstruction by Defendant, ib.—Damages, 925.*

EVIDENCE FOR DEFENDANT, *ib.*

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FORM OF REMEDY AND PLEADINGS.] Case is the proper form of remedy for the disturbance of a way, whether public, 4 M. & S. 101, 2 Bing. 263, or private, Com. Dig. *Disturbance*, A. 2. But in some cases, where the way has been granted by deed or agreement, not under seal, the form of remedy should be thereon in covenant or assumpsit. One who has a grant of an occupation way may declare in case against the owner of the land, over which the way leads, for obstructing it, although it be proved that the public in general had used the way for the last twelve years: *Allen v. Ormond*, 8 East, 4.

*Declaration.*] The *venue* in the action is local. The declaration should commence by stating the plt.'s title to the right of way; if a private one, there is no occasion to state the plt.'s title specially, as that he was *seized in his demesne*, as of fee of a house, &c. and was entitled by prescription or grant, &c. to the right of way; it is sufficient to state, that the plt., at the time the injury was committed, was *possessed* of a house or land, &c. and that, "by reason of such possession," he was entitled to the way: Com. Dig. *tit. Pleader*, C. 39; and *tit. action on the case for Disturbance*, B. 2 Saund. 113, a. n. 1, 172, n. 1; 3 T. R. 766. If, however, the right of way be not appurtenant to the house, &c. and the plt. be

entitled thereto by grant, agreement or license, the allegation, "by reason of the possession," &c. would be improper: 4 East, 107; 6 East, 436; see 15 East, 108; 3 Taunt. 24; *ante*, 364. And it should seem best, in some cases, to declare on such grant, &c. and not in this case. And it is said, that the describing the way as belonging and appertaining to a messuage is improper, on the ground that a way is an easement, and not an appurtenant: Yelv. 159; 1 Bulstr. 47; Com. D. *Chemin, D.* A servant put in the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may properly declare on it as his own possession; and it matters not, that the cottage was divided into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent: *Bertie v. Beaumont*, 16 East, 33; and see 2 D. & R. 31; 1 B. & C. 8, *s. c.*

The way itself should be stated accurately, according to the fact, or a variance would be fatal. It should be described as a way; the term "passage" would be too general: Yelv. 163-4; 1 Brownl. 216. It should be shown, what the way is for, as whether it be a footway, horseway, or cartway: Yelv. 164, Com. D., *Action on the case for Disturbance, B. 1.* Though, in the case of a public way, the term "common highway" signifies a way for all manner of things, R. T. Hardw. 315, 2 Saund. [\*919] 153, *b.*, \*8 East, 4, 1 H. Bl. 355, if the way be qualified, it should be so stated. Thus, if it be not a way for all purposes, as merely for horses, or on foot, or not at all times of the year, it should be stated accordingly, or it would be fatal, &c.: 4 Camp. 190; 8 East, 4. If there be any doubt as to the evidence to meet the description of the way, other counts should be added. In a case where a public way was stated to be for all the liege subjects to go, &c., with their horses, coaches, carts, and carriages, and the evidence was, that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held no variance, it not being laid as a highway for all courts: *Rex v. Lynn*, 1 R. & M. C. N. P. 151. Evidence of a prescriptive right of way for all manner of carriages does not necessarily prove a right of way for all manner of cattle, and a nondescription in this respect would be fatal: *Ballard v. Dyson*, 1 Taunt. 279. But it is evidence of a drift-way, for the jury to consider together with the other evidence: *ib.* The extent of the usage is evidence of a right only commensurate with the user: *ib.* A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such way for general and universal purposes: *Jackson v. Stacy*, Holt, 455. Proof of a more ample right than that claimed will be no variance: *semb. Bushwood v. Pond*, Cro. E. 722; 1 Taunt. 142. And it is no variance, although it appears that to the enjoyment of the right a condition is annexed, in the nature of a consideration for such enjoyment: see *Gray v. Fletcher*, B. N. P. 29; Cro. E. 563.

With respect to the *termini* of the way, or places from and to which the way leads, the same should be stated accurately, or a variance would be fatal. In stating a *public* way, such *termini* need not be stated at all, for such ways have no certain boundaries, but this is otherwise, in stating a *private* way, because private ways are given for particular purposes, and it must therefore be shown they were used for such purposes: *Rouee v. Bardin*, 1 H. Bl. 358. The *termini* should be stated to be into a public highway, 8 East, 4, 2 Leon. 10, 2 Saund. 158, *d.*; or if the way lead

to a private close, some interest of the plt. therein, or the local situation thereof, should be stated: Noy, 9, 86, Com. D. *Action on Case for Disturbance*, B. 1; Chemin. D. 2. It seems sufficient, in all cases, to describe the way as leading "towards" a public highway, &c., 1 East, 377, 1 B. & P. 371; and it is frequently advisable to adopt such general description. The words "from" and "unto" have both of them an exclusive meaning, 2 Rol. Ab. 81; 1 Leach, 528; 1 Burr. 376. A material variance in the description of the *termini* will be fatal: thus, an averment that a highway leads from A. to C. will not be satisfied by evidence of a road leading from A. to B., and communicating by means of a cross-road: 6 Esp. Rep. 136. A claim of a prescriptive right of way over the deft.'s close into D. is not supported by proof that a close called C., over which the way once led, and which adjoins to D., was formerly possessed by the owner of close A., and was by him conveyed in fee to another, without reserving the right of way, for thereby it appears that the prescriptive right of way does not, as claimed, extend unto D., but stops short at C. *Quære*, if the claim had been for a prescriptive right of way over the deft.'s close towards D.? *Wright v. Rattray*, 1 East, 377.

The obstruction should be stated according to the facts, though plt. is not bound to prove all the means stated. Indeed, it is not necessary to state at all the means by which the way was obstructed, and it suffices to say, generally, that the deft. obstructed it, &c.: see 3 Leon. 13; 3 Wils. 583; 1 B. & P. 180; Com. D. *Action on Case for Disturbance*, B. 1. The day of the obstruction need not be proved, as alleged.

*Plea.*] Under the general issue, the plt. will be put to all the material allegations in the declaration: see *post*, 925, and *ante*, 344, pleas in case.

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\* *Precedents.*

[\*920]

DECLARATION FOR OBSTRUCTING PLT.'S PRIVATE RIGHT OF WAY, APPURTENANT TO A MESSAGE.

For that whereas the said plt., before and at the time of the committing of the grievances by the said deft., as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed (*ante*, 918) of a certain message, with the appurtenances, situate, lying, and being at the parish of C., in the county of B.; and, by reason thereof, he, the said plt., during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from and out of the said message, towards, unto, into, through, and over a certain close, in the parish aforesaid, and from and out of the same, towards, unto, and into a highway, in the parish aforesaid, and so back again from the said highway towards, unto, and into, through, over, and along, the said close, and from and out of the same towards, unto, and into, the said message of the said plt., for himself and his servants, on foot, and with horses and carriages, to go, return, pass, and repass, every year, and at all times of the year, at his and their free will and pleasure. Yet the said deft., well knowing the premises, but wrongfully and unjustly contriving and intending to injure the said plt. in that behalf, and to deprive him of the use and benefit of his said way, whilst he the said plt., was so possessed of his said message, with the appurtenances, as aforesaid, to wit, on &c. (*any day about the time*), and on divers other days and times between that day and the day of exhibiting this bill, at the parish aforesaid, in the county aforesaid, wrongfully and injuriously obstructed and stopped up the said way, and the said plt., by means thereof, could not, during the time aforesaid, or any part thereof, nor can he now, have or enjoy his said way, as he of right ought to have done, and otherwise

might and would have done, and hath been and is, by means of the premises, deprived of the use, benefit, and advantage thereof, to wit, at, &c., aforesaid.

See other precedents of declarations for obstructing a private way, stating the means of obstruction, 2 Chit. Pl. 807; for obstructing a way to fetch off tithes, *ib.*, 810; for obstructing a public way, *ib.*, 598, 4 M. & S. 101.

### *Evidence for Plaintiff.*

The evidence for plaintiff in an action for a disturbance of a way, whether it be public or private, will consist in proof of the plt.'s right to the way, the way itself, as stated, the obstruction of it, and the damages.

*Proof of PUBLIC WAY.*] The evidence to establish a right of way for the public may consist in showing its existence by an act of Parliament, by prescription, or by dedication or grant.

*By Act of Parliament.*] A highway may be created by an act of Parliament: *Sutcliffe v. Greenwood*, 8 Price, 535. And where a way has been recognized as public in an act of Parliament for making streets, squares, &c., it is not necessary that it should be adopted by the parish to make it a public way; *Rex v. Lyon*, 5 D. & R. 497. If the act of Parliament be a public one, it will prove itself; if it be a private one, it should be proved, as *ante*, 33.

*By Presumption.*] To establish a public way, it should be shown that all persons have indiscriminately, for a considerable space of time, without interruption, used and enjoyed the way; and the mode in which it was used should be shown. A much shorter period of possession will suffice to establish a right in the public than to show a right in a private person, to a way. If the way has been used in any particular manner, such as would attract the notice of the owner of the soil, and naturally awaken his jealousy and opposition, the same should be established; as that it has been used for the repairs of other highways, or the [\*921] like: see *R. v. Wansworth*, 1 B. & A. 63. It has been said, that the acquiescence of the owner, in such a case, affords a stronger presumption of right than that which results from mere possession and use in ordinary cases: 3 Stark. Ev. 866. If the owner of the soil was present on such occasions, and did not resist the right, the same should be proved. If the parish have repaired the road, that would afford some evidence of the public right, 1 B. & A. 63, see 7 B. & C. 257; and such fact should be proved. Evidence of repairs done by a parishioner, under an agreement with the parish, that he shall therefore be excused his statute-duty, is virtual evidence of repairs by the parish: *ib.* Evidence of reputation, also, not *post litem motam*, may be adduced to show the way is public: 1 Vent. 189; 3 Camp. 344. The *termini* of a way afford no conclusive evidence of its being a highway, 2 East. 376, 1 Camp. 352; but the circumstances of its leading from one market-town to another, together with evidence of user by the public, without interruption is such conclusive evidence: 1 Vent. 189. A verdict on an issue,

taken on a public right of way, and finding it to be such, is afterwards evidence: 2 East. 355.

*By Dedication.*] A public highway may be created by the owner of the land dedicating it as a way for the use of the public: thus, if the owners of land knowingly suffer the public to have the free passage of a street in London, though not a thoroughfare, for eight years, without any impediment, it is sufficient to presume a general dedication of it to the public: *Rugby v. Charity Merryweather*, 11 East. 376, n. Persons had for some years been in the habit of passing up and down a new unpaved and unfinished street, which terminated in fields, where other houses were built; a jury having found a dedication to the public, the court refused to grant a new trial, which was moved for on the ground that this was not a sufficient evidence for a dedication: *Jarvis v. Dean*, 3 Bing. 447. If a passage, leading from one part to another of a public street (though by a very circuitous route,) made originally for private convenience, has been open to all the world for a great number of years, without any bar or chain across it, and without any person passing through it meeting with interruption, it is to be considered as dedicated to the public, and, it becomes a highway: *Rex v. Lloyd*, 1 Camp. 260. And, where a way has been used by the public for a great number of years over a close, in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public, may be presumed, although he was never in the actual possession of the close himself, and he is proved not to have been near the spot: *Rex v. Barr*, 4 Camp. 16.

But, if the land had been out on a lease, the acquiescence of the tenant will not bind the landlord, without some evidence of his knowledge, sufficient to presume a grant from him: 11 East. 376. And, where a way was used by the public for a great number of years, over a close leading only to the houses of lessees, there being no thoroughfare, although it was also proved that the way had been paved and lighted for the like number of years, under the authority of a public, local, and personal, act of Parliament, in which it was enumerated by name amongst the public streets, lanes, &c., within the scope of the statute: yet, inasmuch as there was no evidence that all this took place with the landlord's privity, he was not prejudiced, and there was no sufficient dedication to bind him: *Wood v. Veal*, 1 C. & P. 20, s. c.; 5 B. & A. 454. And, where a public footway over crown land was extinguished by an inclosure act, but, for twenty years after the inclosure took place, the public continued to use the way, it was held, that this was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown: *Harper v. Charlesworth*, 4 B. & C. 574; 6 D. & R. 672, s. c. The erection of a bar, although it may have been knocked down, rebuts the presumption of a dedication to the public: *Roberts v. Karr*, 1 Camp. \*262. The plt. erected a street, leading out of a high- [\*922] way, across his own close, and terminating at the edge of the deft.'s adjoining close, which was separated from the end of the street for twenty-one years (during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways, and half the horseway thereof, paved at the expense of the inhabitants,) by the deft.'s fence: it was held that this street was not so dedicated to the public that the deft., pulling down his wall, might enter it at

the end adjoining his land, and use it as a highway: *Woodyer v. Haddon*, 5 Taunt. 125. Where a road was set out by commissioners under a local act of Parliament, and certain persons only were entitled to use it, but in fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public: *R. v. St. Benedict*, 4 B. & A. 447.

Where a landowner suffered the public to use, for several years, a road through his estate, for all purposes except for that of carrying coals, it was held that this was either a limited dedication to the public, or no dedication at all, but only a license revocable, and that a person carrying coals along the road, after notice not to do so, was a trespasser, *Marquis of Stafford v. Coyney*, 7 B. & C. 257; and, from the same case, it seems there may be a limited dedication of a highway to the public: *ib.*; *sed vide Lethbridge v. Winter*, 1 Camp. 263; 1 Russ. 451. It may be as well to observe, that the dedicating a way to the public is merely a communication of the right of passage, for the original owner retains his interest in the trees which grow upon it, and the mines under it: 2 Inst. 705; 1 Burr. 143; 2 Str. 1004; 1 Camp. 260, *n*.

**Proof of PRIVATE WAY.]** The evidence to establish a private right of way for the plt. may consist in showing its existence by grant, by prescription, or by necessity. The possession of the property in respect of which the way is claimed, as appurtenant or otherwise, must be proved as stated: see *ante*, 918, as to what a variance when the property is in possession of another person. If the plt. sue as a reversioner, which he may do, if there has been a substantial obstruction, 4 Burr. 2141, he must prove his title as such reversioner: *ante*, 473, 689.

**By Grant.]** Where there has been an actual grant of the way, as we have already seen, the declaration and evidence should be framed accordingly. The evidence to establish this right of way will consist in production and proof of the grant, &c.: see *ante*, "*Deed*." If the same be not in existence, and cannot be shown by secondary evidence (as to which, see *ante*, 779) presumptive evidence of its having existed must be established. Evidence of an enjoyment of the way uninterruptedly, for twenty years, affords the strongest presumptive evidence of a legal right by grants: *Reymer v. Sumers*, B. N. P. 74; *Holcroft v. Heel*, 1 B. & P. 400; Cowp. 102; 2 Saund. 175. The presumption may, indeed, be founded on a shorter period of enjoyment, if it be supported by confirmatory evidence: see 6 East, 214; 2 Saund. 175; and see, further, *ante*, 728. How presumptive evidence of a grant may be rebutted, *post*, 925. The presumption does not operate where such a grant could not, from the nature of the case, have been made: *Barker v. Richardson*, 4 B. & A. 579. Where the deft. had pleaded a grant of right of way by deed subsequently lost, plt., in his replication, traversed the grant: at the trial, there being conflicting testimony as to the uninterrupted user of the way, the Judge directed the jury, that if, upon this issue, they thought deft. had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, they would find for the deft.; if they thought there had been no way granted by deed, they would find for the plt.: it was held, that this direction was right: *Livett v. Wilson*, 3 Bing. 115; 10 Moo. 439, *s. c*. Where [923] no evidence appeared to show that a way over another's land



had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above twenty years, exercised adversely, and under a claim of right, is sufficient to leave to the jury to presume a grant which must have been made within twenty-six years, as all former ways were, at that time, extinguished by the operation of an inclosure act: *Campbell v. Wilson*, 3 East, 294.

With respect to the construction of parts of way, it has been held, in an action on the case for the disturbance of a right of way, leading from a public street through the deft.'s premises, to a yard at the back of the plt.'s house, originally forming part of the premises demised by lease to the deft., that a grant of all ways used or enjoyed before, with the plt.'s premises, was good, though there was no express grant of the way in question: *Kooystra v. Lucas*, 1 D. & R. 506, s. c.; 5 B. & A. 830. Under a grant of way from A. to B., in, through, and along a particular way, the grantee is not justified in making a transverse road across the same: *ib.* Where an under-lease described the road demised, and the ways granted, by the words, "all ways thereunto appertaining," it seems that a right of way over the original lessor's soil would not pass by these words: *Harding v. Wilson*, 2 B. & C. 100, s. c.; 2 D. & R. 387. One, being seized in fee of the adjoining closes, A. and B., over the former of which a way had immemorially been used to the latter, devises to B., with the "appurtenances:" it was held that the devisee cannot, under the word "appurtenances," claim a right of way over A. to B., as no new right of way is thereby created, and the old one was extinguished by the unity of seizin in the devisor: *Whalley v. Thompson*, 1 B. & P. 371. No way, or other easement, can subsist in land of which there is a unity of possession: *Morris v. Edgington*, 3 Taunt. 24. But, if a lessor, having used convenient ways over his own adjoining land, during his own occupation, demises premises with all ways appurtenant, unless it be shown in evidence that there was some way appurtenant in *alieno solo*, to satisfy the words of the grant, it shall be intended that he meant the ways used, and they shall pass, though he call them appurtenant: *per Mansfield, C. J., Morris v. Edgington*. A. granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted on the broadest part of the road, but in the narrowest part of it a narrow strip of the grantor's land intervened, between the road and the premises granted: it was held that the grantor, and those claiming from him, were concluded from preventing the grantee from coming out into the road over the slip of land: *Roberts v. Karr*, 1 Taunt. 495. Under the grant of a free and convenient way, for the purpose of carrying coals (among other articles,) the grantee has a right to lay a framed wagon-way: *Senhouse v. Christian*, 1 T. R. 560. And, where A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage-way, and gave him "all other liberties, powers, and authorities, incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road-way or passage," it was held that, under these words, B. had a right to put down a flagstone in this piece of land, in front of a door opened by him out of his house, into this piece of land: *Gerrard v. Cooke*, 2 N. R. 109.

*By Prescription.*] Proof of an uninterrupted enjoyment of the way, from time whereof the memory of man runneth not to the contrary, unanswered and unexplained, affords conclusive evidence of title to the way: *Campbell v. Wilson*, 3 East, 294; 3 Stark. Ev. 1204. As to what may be shown to rebut the prescription, see *post*, 925. The prescription should be proved by living witnesses, as far back as living testimony can go; and, in the absence of living testimony, ancient deeds and other [\*924] instruments\* relating to the exercise of the right, and derived from the proper custody, should be produced and proved: *ante*, 423. Mere reputation is not, it seems, admissible to prove the right: 3 Stark. Ev. 1209.

*By Necessity.*] The plt. must be prepared to prove the particular facts and circumstances which give him the right. It is a principle of law that, where the use of a thing is granted, every thing is granted by which the grantee may enjoy such use: 1 Saund. 323. Therefore, where one, as trustee or otherwise, conveys land to another, to which there is no access but over the grantor's land, a right of a way passes of necessity, as incidental to the grant: *Howton v. Frearson*, 8 T. R. 50. And, *semble*, if the owner of two closes, having no way to one of them but over the other, part with the latter, without reserving the right of way, it will be reserved for him by operation of law: *ib.*; Cro. J. 270. Where a lease of a parcel of building-ground described certain premises as abutting on "an intended way of thirty feet wide," which was not then set out, the soil being the property of the lessor, and the lessee underlet the premises, and described them as abutting on "an intended way," without mentioning the width; and the soil of the intended way, together with the adjacent land on the other side, was afterwards sold by the lessor to another person, who narrowed the intended way to twenty-seven feet by building a wall thereon, it was held that the tenant of a house, built by the under-lessee, was entitled only to a way of necessity and convenience, which, having been left him, he could not maintain an action on the case, for the alleged encroachment, he having sustained no actual injury thereby: *Harding v. Wilson*, 3 D. & R. 287, *s. c.*; 2 B. & C. 96; 3 D. & R. 287. A way of necessity can exist only from express or implied grant, and there is no such thing as a general way of necessity: *Bullard v. Harrison*, 4 M. & S. 387; 1 Saund. 323. In the case in 4 M. & S. 387, it was held that a person who prescribes in a *que* estate, cannot justify going out of a private way, on the adjoining land, because the way is impassable. If the origin of the way of necessity cannot be traced, it must be claimed by evidence of a presumptive grant or prescription. As to what deft. may show in answer to this right of way, *post*, 926.

There are, indeed, other ways of necessity depending on the same principle as the above; as, where the law gives any thing, it also gives every thing which is necessary to the enjoyment of it. Thus, a rector may enter into a close to carry away tithes over the usual way, as incident to the tithes: *Cobb v. Selby*, 2 N. R. 466. And, where there is a private road through a farm, the person may use it for carrying away his tithe, though there is another public road equally convenient: *Cobb v. Selby*, 6 Esp. Rep. 103. But the maxim is to be understood of things incident and directly necessary: Hob. 234.

*Proof of the WAY, as stated.*] The way must be proved as stated, and

any material variance would be fatal, as a variance in the time and mode of enjoyment, or the *termini* of the way. As to what would be a variance, and what sufficient evidence to answer the way described, see *ante*, 918-9. The time and mode of using the way should be proved by the oldest witnesses, who are well acquainted with the property and one or more of the prior occupiers, or their servants, who constantly used the way, should be subpoenaed. If the owner of the soil, or his predecessors, can be proved to have seen the way used, and did not object to it, such fact should be proved. The *termini* of the way, as stated, should be proved by witnesses who can well speak to the fact.

*Proof of the Obstruction by Defendant.*] This should be proved as stated. The nature of the proof must depend on the means of obstruction used. A slight obstruction will, in general, suffice: see *ante*, "Nuisance." \*With respect to what obstruction must be proved [\*925] by the plt., who sues for an injury to him in using a public way, it seems the same evidence of obstruction will suffice as in an action for obstructing plt. in a private way; but the plt. must, in addition, aver and show he has sustained some damage and particular injury. It has been held, that being delayed four hours by an obstruction in a highway, and thereby prevented performing the same journey as many times in a day, as if the obstruction had not existed, is a sufficient injury to entitle a party to sue the obstructor, *Greasly v. Codling*, 2 Bing. 263, and see *Rose v. Miles*, 4 M. & S. 101, *Hubert v. Groves*, 1 Esp. Rep. 148; and the plt. being obliged to go a circuitous route, would, it seems, suffice: *ib.*

*Damages.*] The damages are, in general nominal, which will carry full costs. If there be any special damage stated, the same should be proved. As to what is special damage, *supra*, and *ante*, 344.

#### *Evidence for Defendant.*

Under the general issue, the deft. may rebut the plt.'s necessary proofs in establishing the right of way, or the obstruction of it, and as to what other defences he may show under it or not, see *ante*, 344; and see the various titles of defences throughout the work.

It is no answer where a *public* right of way is set up, for the deft. to show that there is no thoroughfare, 11 East, 375, *sed vide* 5 Taunt. 125, 5 B. & A. 454; or that the way is very circuitous, 1 Camp. 261, 3 T. R. 265: or leads to a common, or is used by the public but occasionally; or does not terminate in a town, or in any other public road: 1 B. & A. 63; 11 East, 376, *n. a.*; *sed vide* Hawk. b. 1. c. 76, s. 1. A right of way for all the king's subjects to pass and repass, with their carts and carriages, is not restrained because all carriages cannot pass and repass: *Rex v. Lyon*, 5 D. & R. 497.

The deft. may rebut a presumption of the grant of the way, though such presumption arises from a possession of the way beyond twenty years, by accounting for the original possession, consistently with a title existing in another. Thus, the presumption may be rebutted by proof that exercise and enjoyment of the way were acquiesced in, not by the owner of the inheritance, but by one who possessed a temporary interest only, as a tenant for life or years, whose laches cannot prejudice such owner of the

inheritance, *ante*, 55; or by proof that, although the enjoyment was with the owner of the inheritance, it was not *adverse*, but was with the leave and license of the owner of the soil, or was exercised under a mutual mistake: 3 East, 294; 3 Stark. Ev. 1217-8.

In order to rebut evidences of a title to the way by *prescription*, *deft.* may show the commencement of it within legal memory: Co. Lit. 115. A grant, within the time of memory, does not necessarily destroy the presumptive claim, for it may be intended merely as a confirmation: 2 Bl. R. 989. If repeated usage within the time of memory cannot be proved, the prescription fails: Co. Lit. 113, *b*. So, a chasm of interruption in the usage, within time of memory, will destroy the prescription, but a tortious interruption will not, 2 Inst. 653; neither will a discontinuance by the lessee of a terre-tenant: 2 Inst. 654: Com. D. *Prescription*. The prescription will be destroyed by proof of unity of possession: 3 Taunt. 4. Com. D. *Suspension*, 3 B. & P. 74. *Deft.* may show that the thing to which the prescription is attached, no longer exists, 4 Co. 48, Com. D. *Prescription*, *G*.; but a mere circumstantial variation in such thing will not suffice: *ib*. A prescriptive right of way to a public towing-path, on the banks of a navigable tide river, is not destroyed by that part of the river adjoining the towing-path having been converted, by statute, into a floating harbour, although such towing-path was thereby sub-  
[\*926] ject to be used at all\* times of the tide, whereas it was before only used at those times when the tide was sufficiently high for the purposes of navigation; and such prescription is not destroyed by a clause in the statute, whereby the undertakers in the work were authorized to make a towing-path over land, comprising the towing-path in question, on paying a compensation to the owner of the soil: *Rex v. Tipsett*, 3 B. & A. 193.

In answer to a right of way of *necessity*, as such right is limited by the necessity which created it, *deft.* may show such necessity has ceased, for on such cession the right of way also ceases; therefore, if at any subsequent period, the party formerly entitled to such way can approach the place to which it led, by passing over his own land by as direct a course as he would have done by using the old way, such way will cease to exist as of necessity: *Holmes v. Goring*, and *Same v. Elliot*, 9 Moo. 166, *s. c.*; 2 Bing. 76. And, if a person having a right of way over the close of A., for the occupation of his close B., purchase an adjoining close C., he cannot use the way for the occupation of the latter close: *Laughton v. Wards*, Lutw. 111. But a way of necessity exists after unity of possession of the close to which, and the close over which, and, after a subsequent severance, if a person purchase close A., with a way of necessity thereto over close B., a stranger's land; and afterwards purchase close B., and then purchase close C., adjoining close A., and through which he may enter the close A., and then sell close B. without reservation of any way, and then sell closes A. and C., the purchaser of close A. shall, nevertheless, have the ancient way of necessity to close A. over close B. *Buckley v. Coles*, 5 Taunt. 311.

#### Competency of Witnesses.

An inhabitant of the parish is not a competent witness for the *deft.*, to prove the road is not a public way: 1 B. & A. 66; 15 East, 474; 10 Mod.

150. A person is competent to prove a road to be a highway, though he has agreed to grant, at an annual rent, a way across his own land, which cannot be used unless the disputed road be established: *Pea. Rep.* 18. A person who has subsequently become, or who is to become, entitled, or who has purchased the right of way, is not competent, for the *plt.*, to prove it.

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WAY, DEFENCE UNDER RIGHT OF.

PLEADINGS AS TO, 927.

PRECEDENTS, 928.

EVIDENCE, 929.

A right of *way*, either public, 1 H. Bl. 352, 8 T. R. 606, 2 Saund. 158, c. n. 4, 6; or private, *ib.*; and whether by grant, 2 Mod. 274, 3 East, 294; will, 1 B. & P. 371, 1 Saund. 323, n. 6, 2 Saund. 151, c.; or prescription, 1 East, 350, 1 B. & P. 571, 1 Saund. 322, n. 6; custom, or of necessity, 1 Saund. 323, 8 T. R. 50, Lutw. 1487, must be pleaded specially, and cannot be given in evidence under the general issue.

The mode of pleading a *public* right of way has already been considered, when showing how it should be stated in a declaration. The *termini* of the way need not be stated, *ante*, 919; if the right be qualified as to the mode or time of user, &c., the plea should state it accordingly, *ante*, 919.

\*In pleading a *private* way, it should be stated specially by what title the *plt.* claims the way, as that he is seized in fee, &c., [\*927] and claims the way by prescription, by grant, or by necessity; and in this respect a plea differs from a declaration for the disturbance of a way, which shows merely that *plt.* was *possessed* of the property in respect of which the right is claimed: *ante*, 918; 3 T. R. 766; 2 Saund. 113. As to the mode of pleading a private right of way in general, see *Com. D. Chemin. D. 2*, &c.; *Bac. Ab. Highways, C.* Where, to an action of trespass, *quare clausum fregit*, the *def.*, in a plea of justification of a right of way over the *locus in quo*, stated the surrender of a copyhold to him, with all ways then used by the tenants and occupiers thereof, and that he was admitted and continued seized, and, being so seized, and having occasion to use the way, committed the trespass; and it being proved that he was seized of the premises in respect of which the right of way was claimed, and occupied only by means of a tenant to whom the premises were demised, it was held that he was an occupier, to sustain the plea of justification pleaded, as the words of the plea were sufficiently large to comprehend all the purposes for which a person seized might lawfully use the way: *Hollis v. Proud*, 2 D. & R. 31, s. c., *nom. Proud v. Hollis*, 1 B. & C. 8. And where, in trespass *quare clausum fregit*, plea that *def.* was seized in his demesne as of fee of messuage, &c. in the parish, and that he, and all those whose estates, &c., has a right of way for himself, his and their farmers and tenants, occupiers of the messuage, &c. over the *locus in quo* to and from the messuage, &c. as

appertaining thereto, replication that deft., and all those, &c., have not the said way as appertaining to the said messuage, &c., it was held, that the deft.'s showing that he was seized in fee of an ancient messuage in the parish to which right of way, as pleaded over the *locus in quo*, belonged, was evidence sufficient to support his plea, although the messuage was let to, and in the occupation of a tenant, and the deft. only occupied a newly built house in the parish at the time of the trespass: *Stott v. Stott*, 16 East, 343.

When there has been an actual grant of the way, the plea should be framed accordingly, setting forth such grant, and making a profert of it: see 1 B. & P. 371; 3 East, 294; 1 T. R. 561.

When there is no existing grant, and any reason to apprehend that a prescriptive right of way may have been extinguished by unity of possession, it must then be claimed as a way by non-existing grant, stating it to be lost and destroyed by accident, to avoid the necessity of a profert: 3 T. R. 157; 1 Saund. 323, *a.*; 3 East, 294. In such plea, the names of the parties to the supposed grant must be stated, 10 East, 55; and, if there be any doubt as to them, or in other respects, other pleas should be added. It must be stated in such plea that the same person was seized in fee of both closes, *simul et semel*, and, being so seized he granted one of them: 1 Saund. 323, *a.* Where there has not been a unity of possession, and the way has been used immemorially, it must then be pleaded as a way by prescription: B. N. P. 74. In a plea of right of way of necessity, the title to it must be stated, viz. that such way arose from a grant, 2 Lutw. 1487, stating such grant as in a plea of way by grant: 2 Saund. 323, *a.*; see 10 East, 55; 4 M. & S. 487; 5 Taunt. 311. If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way either by grant or prescription, according to the circumstances of the case.

The *termini* and course of the way should be stated; and as to the mode of stating it, and what a variance, see *ante*, 919. If the right be qualified in the mode or time of user or otherwise; the same should be stated accordingly; and as to what a variance, see *ante*, 919.

*Replication.*] The plt. may deny the way, and conclude to the [\*928] \*country, 1 Saund. 103, *b.*, or allege that the deft. used the way to another tenement than that alleged in the plea: 16 East, 350. To a plea of a private way, the deft.'s seizin, or title, may be denied; and the plt. may, under such replication, give in evidence an order of justices upon an inclosure act, and award thereon, whereby the public or private way has been stopped: 1 East, 64; S. N. P. 1130. By not denying such seizin, or title, plt. admits it: 16 East, 343. If the plt. means to insist that the occupation was in another, he should reply that fact, admitting the seizin: *ib.* Where the plt. cannot deny the plea, and only insists that the deft. trespassed out of the way, or was guilty of unnecessary damage in removing an obstruction, or actually converted the materials to his own use, in order to save unnecessary expense, the plt. should not deny the right of way, but should merely new assign *extra viam*, &c., but he may do both. And, where a right of way is claimed, which is disputed by the owner of the close, and the deft. has committed trespasses in other parts besides those over which he claims the way, if the deft. plead the right of way, the deft. must traverse it, and further state, in a new assignment,

that the deft. committed trespasses in the other parts of the close: 1 Saund. 300, and *ib.*, *n. a.* So, if the deft. has used the way, &c. in a different manner from what he was entitled to do under the grant, the plt. must new assign: 1 Saund. 300, *a.* By new assigning, the plt. may frequently obtain full costs, which otherwise he would not recover: thus on a plea of not guilty to a new assignment of *extra viam*, the plt., though he should obtain a verdict for less than forty shilling's damages, is entitled to full costs, without a judge's certificate, Tidd's Prac. 8 *ed.* 1002, 1 East, 351, 1 Saund. 300, 3 B. & A. 443, unless the way pleaded was set forth by metes and bounds, *ib.*, Hul. 86, *s. c.*, 1 East, 351, and see 9 Pr. 336, or unless the deft. confesses the trespasses newly assigned, and abandons that part of the general issue to the declaration pleaded as to them: 1 B. & B. 465.

### Precedents.

#### PLEA, JUSTIFYING TRESPASSES UNDER A PUBLIC WAY, AND KNOCKING DOWN GATES, &c. BECAUSE OBSTRUCTING IT.

And, for a further plea, &c. (*Actio non, as ante, 725.*) Because he saith that, before and at the said several times, when, &c. there was, and of right ought to have been, a certain common and public highway into, through, over, and along the said close, in which, &c., for all the liege subjects of our lord the king, to go, return, pass, and repass, on foot and with cattle and carriages, at all times of the year, at their free will and pleasure. Wherefore the said deft., being a liege subject of our said lord the king, at the said several times, when, &c., went, passed, and repassed, on foot, and with the said cattle and carriages, into, through, over, and along the said close, in which, &c., in, by, and along the said highway there, using the same as he lawfully might for the cause aforesaid; and, in so doing, he, the said deft. (*the following averments must agree with the facts complained of in the declaration*) with his feet in walking, and with the said cattle and carriages, unavoidably a little trod down, trampled upon, and consumed, and spoiled the grass and corn there growing and being in the said close in which, &c., and subverted, damaged, and spoiled the earth and soil of the same close; and the said cattle, at the said several times, when, &c., in passing and repassing along the said way, by stealth and morsels, and against the will of the said deft., eat up and depastured a little other of the grass and corn there then growing in the said way. And, because the said gates in the said declaration mentioned, before the said several times, when, &c., had been wrongfully erected, and were then standing and being in and across the said highway, and obstructing the same, so that, without breaking down, prostrating, and destroying the said gates respectively, the said deft. could not then pass and repass with the said cattle and carriages, into, through, over, and along the said close in which, &c., in the said highway there, as he ought to have done, the said deft., at the said several times, when, &c., in order to remove\* the said obstructions, broke down, prostrated, and destroyed [*\*929*] the said gates in the said declaration mentioned, and took and carried the gates to a small and convenient distance, and there left the same for the use of the said plt., doing no unnecessary damage to the deft. on those occasions, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plt. hath above complained against him, the said deft. And this, &c. (*Conclude with a verification, as ante, 725.*)

#### PLEA, JUSTIFYING TRESPASSES UNDER A PRIVATE WAY, BY PRESCRIPTION BY A FREEHOLDER.

(*Actio non, as ante, 725.*) And the said deft., further saith that he, the said deft., long before and at the said several times, when, &c., was and still is seized in his demesne as of fee, of and in the occupation of a certain messuage, contiguous and next adjoining to the said close, in which, &c., and that he the said deft., and all those whose estate he now hath, and at the said several times, when, &c., had of and in the said messuage, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said deft.,

at the said times, when, &c., of right ought to have had and used, and still of right ought to have and use, a certain way for himself and themselves, and his and their servants, farmers, and tenants, occupiers of the said messuage, to pass and repass on foot (*according to the fact*) from a certain common king's highway, in the parish of \_\_\_\_\_, aforesaid, into, through, over, and along the said close of the said plt., called \_\_\_\_\_, in which, &c., unto and into the said messuage of the said deft., and so from thence back again unto, into, through, and over and along the said close of the said plt., called \_\_\_\_\_, in which, &c., unto and into the said common king's highway, at all times of the year, at his and their free will and pleasure. And the said deft., being so seized of his said messuage, and having occasion to use the said way, did, with his servants, at the said several times, when, &c., pass and repass in, by, and through, and along the said way from the said common king's highway, into, through, over, and along the said close of the said plt., called \_\_\_\_\_, in which, &c., unto, and into the said messuage of the said deft., and so from thence back again in, by, through, and along the said way, unto and into the said common king's highway, using the said way there for the purpose and on the occasions aforesaid, as he lawfully might for the cause aforesaid. And, in so doing, &c. (*Same as the last precedents, justifying the trespasses according to the facts.*)

See other precedents of pleas by a tenant, 3 Chit. Pl. 1127; by a copyholder, *ib.*, 1120; right of way by non-existing grant, *ib.*, 1122; right of way where deft. had closes at both ends of the way, *ib.*, 1121; right of way, of necessity, *ib.*, 1125; right of way to a well to take water, *ib.*, 1127; right of way to take tithe, *ib.*

See forms of replications, denying right of way, 3 Chit. Pl. 1212; *extra viam*, *ib.* 1215; replication, traversing the right of way, and new assignment of *extra viam*, *ib.*

### Evidence.

The necessary evidence must depend upon the issue taken by the pleadings; as to the mode of proving a public right of way, see *ante*, 920; and a private right of way, *ante*, 922; how to rebut the right, *ante*, 925; as to what issue the pleadings will raise, see *ante*, 928; as to the competency of witness, *ante*, 926.

[\*930]

\*WILLS.

*Proof of Will of Personal Property*, 930.

*Proof of Will of Real Property*, 931.—*Production and Proof of Will*, *ib.*—*Calling attesting Witness, and proving Execution*, *ib.*

—*Proof of Testator's Signing and Subscription*, 932.—*Proof of Attestation*, *ib.*—*Who a Credible Witness to attest*, 933.

—*Proof of Publication*, 935.—*Proof of Will Thirty Years old*, *ib.*

*Proof of Will of Copyhold Property*, *ib.*

*Parol Evidence, when admissible to explain, &c. a Will*, 936.

*Proof of Vacation: by Revocation*, 937.—*By subsequent Will or Codicil*, *ib.*—*By other Writing*, *ib.*—*By Cancelling*, *ib.*—*By Implication*, *ib.*

*by Fraud, Incapacity, &c.* 938.

*Proof of Will of PERSONAL PROPERTY.]* A will of *personal* property is proved by production of the probate; *i. e.* a copy of the original will,



under the seal of the ordinary, or metropolitan, together with a certificate of its having been proved before him: 2 Bl. Com. 508. In *Rex v. Inhabitants of Netherseal*, 4 T. R. 260, *Ld. Kenyon* says, "Nothing but the probate, or letters of administration, with the will annexed, are legal evidence of the will, in all cases respecting personalty." But, in *Denn v. Barnard*, Cowp. 595, it appears to have been admitted that an authentic certificate from the Prerogative Court, produced by the proper officer, was equivalent to the probate itself, being, in fact, the same thing, only under another form. Although, however, the probate has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of the Ecclesiastical Court, without some endorsement upon it for the purpose of authentication: *R. v. Barnes*, 1 Stark. 243. If it be shown that the probate has been lost, an exemplification under the seal of the court, or an examined copy of the act-book, Ca. temp. Hardw. 108, *Elden v. Kennel*, 8 East. 187, or the original will properly authenticated and endorsed, as the instrument on which probate has been granted, *Gorton v. Dyron*, 1 B. & B. 219, are admissible as secondary evidence. A will of personalty, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided there be sufficient proof that it is in his handwriting; and, though written in another man's hand, and never signed by the testator, yet, if proved to be according to his instruction, and approved by him, it has been held a good testament of personal estate: 2 Bl. Com. 501. It is customary, however, and prudent, for the testator to sign, seal, and publish, in the presence of two witnesses; for without proof of his hand-writing, or (in case it be written by another person) that that is the testator's will, the ordinary will not grant probate: *Lovell*, 206. In *Page v. Mann*, 1 M. & M. 79, it was held that proof of the hand-writing of a subscribing witness to an agreement for a lease (he being dead,) was sufficient to establish it, without proof of the hand-writing of parties. Besides, the omission of these solemnities in some instances raises a fair presumption of abandonment of an intention on the part of the testator; and in such case the will has been held void: *Matthews v. Warner*, 4 Ves. 185, and 5 Ves. 23; *Griffin's case*, cited in *Matthews v. Warner*, and in *ex-parte Fearon*, 5 Ves. 644; *Coles v. Trecothick*, 9 Ves. 249; and *Walker v. Walker*, 1 Merivale, 503.

**\*Proof of Will of REAL PROPERTY.]** By the Statute of Frauds, 29 Car. 2, c. 3, s. 5, all devises of lands or tenements [\* 931] must be in writing, and signed by the party devising the same, or by some other person, in his presence, and by his express direction, and attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they shall be utterly void. The words lands or tenements in the act denote a fee simple. A will devising an estate which is doubtful, whether strictly copyhold or customary, is not within the act: *Doe d. Cook v. Danvers*, 7 East. 299. These things, therefore, must be proved, in order to substantiate a will of real property within the Statute of Frauds. 1. That the will is in writing: 2. The signature: 3. The attestation.

**Production of Will itself.]** To establish a devise of real property, the will itself must be produced; an exemplification, a copy, or the pro-

bate, is not sufficient: B. N. P. 246. If, however, it has been lost or destroyed, or is in the possession of the opposite party, upon proof of its former existence, and subsequent loss or destruction, or of the possession of the adverse party, and notice to them to produce it, secondary evidence of its contents is admissible, 1 Stark. Ev. 328. *ib.* vol. 3, 1682: as, evidence of it from the register-book, or ledger-book, *St. Segar v. Adams*, 1 Ld. Raym. 731, B. N. P. 246; or an examined copy; or, in the absence of these, which should be accounted for, parol evidence of the will may be admitted: *Doe v. Calvert*, 2 Camp. 389. The probate is not admissible as secondary evidence, without proof, *aliunde*, that it is a true copy, 1 Ld. Raym. 731, 2 Skinner, 174, 3 Stark. 1682; for the Spiritual Court has no authority to authenticate a will of lands: 4 Burn's Eccl. Law. 195; *Netter v. Pratt*, Cra. Car. 396; *Habergham v. Vincent*, 2 Ves. Jun. 230. [A will proved abroad and retained there, established on production of a copy certified under the hand and seal of the proper officer, &c., which had been admitted to probate in the Ecclesiastical Court here: *Pullen v. Rawlings*, 4 Beavan, 142. See also, *Gardner v. Myre*; *Bayley v. Bayley*; *Ellis v. Medicot*, and *Harrison v. Weale*, reported in note, *ibid.*]

*Calling Attesting Witnesses and proving Execution.*] When the will is produced, its execution is proved by one of the attesting witnesses, who proves that it was signed and sealed by the testator, in his presence, and in the presence of the other two subscribing witnesses; and, although one attesting witness, who proves the execution, is sufficient, they may all be examined, and, if the heir object to the will, he is entitled to have them all examined. He must, however, produce them himself: S. N. P. 6th ed. 863. On an issue out of Chancery, indeed, all the witnesses ought to be called, 1 Cooper, 136; and, if the witnesses all attested at separate times, they should be all called: Prec. in Chaunt. 185. In an action by the heir at law against the devisee, to prove the execution of the will, it is not necessary to call the subscribing witness: *Doe d. Stutsbury v. Smith*, 1 Esp. Rep. 391.

When the *witnesses are dead*, their handwriting, and that of the testator, should be proved; and, although the attestation states that the will had been signed by the testator in the presence of the witnesses, without stating that they had subscribed the will in his presence, it was held that it might still be left to the jury to presume that fact: *Croft v. Pawlett*, 2 Str. 1109; *Bruce v. Smith*, Miller, 1; *Hands v. James*, Com. 501.

Although a party is under the necessity of calling the subscribing witness, he is not concluded by the testimony of that witness, if he cannot, or will not, declare the truth. The attestation may be proved by another witness: *Goodtitle d. Alexander v. Clayton*, 4 Burr. 2224. Where one of the attesting witnesses would not swear to the sealing and publication, Holt, C. J., held it was enough to prove his attestation, *Dagwell v. Glascock*, Skinner, 413, and see *Grellin v. Neale*, Pea. Rep. 47, *Talbot v. Hodson*, 7 Taunt. 251. Even though all the witnesses to a will should swear it was not duly executed, evidence may be adduced in support of it: *Lowe v. Joliffe*, 1 W. Bl. 365. Where two attesting witnesses swore that the testator did not publish the will, and was capable of doing so, the court, upon a trial at bar, admitted witnesses to contradict them, [\*932] and \*committed the two attesting witnesses for perjury, taking

security from the plt. to prosecute them: *Hudson's case*, Skinner, 49. Where two of the attesting witnesses are dead, and the surviving witness charges them with fraud in the attestation of the will, evidence of their good character is admissible: *Doe v. Walker*, 4 Esp. Rep. 50; *Bishop of Durham v. Beaumont*, 1 Camp. 207.

*Proof of Signing and Subscribing by Testator.*] The testator's seal, without his signature, will not suffice. It was said by Lord Chief Justice Parker, Baron Clive, and Baron Smith, in *Smith v. Evans*, 1 Wils. 913, that the opinion of North, Wyndham, and Charlton, to the contrary, in 3 Lev. 1, was very strange doctrine. For, if so, it would be very easy for one person to forge any man's will, by only forging the name of any two obscure persons dead; for he would have no occasion to forge the testator's hand; and see *Grayson v. Atkinson*, 2 Ves. 459; *Ellis v. Smith*, 1 Ves. Jun. 11; 17 Ves. 458; 18 Ves. 175. But the converse does not hold. The Statute of Frauds requires the signature of the testator, but is silent as to sealing; and, therefore, where a will of lands was signed, but not sealed, by testator, and two years afterwards, a clause was added to it, signed by the testator, but not sealed, and attested in his presence by three credible witnesses, the will was held good: *Carleton d. Griffin v. Griffin*, 1 Burr. 549. The testator's signature may be in any part of the will, at the beginning, I, A. B., &c., or at the bottom, or in the margin: *Lemayne v. Stanley*, 3 Lev. 1; 1 Freem. 538, s. c.; or, if he cannot write, his mark, or the impression of his name with a stamp, will be a good signature: s. c. Where the will consisted of several sheets, and the testator signed two, but from weakness could not sign the rest, the Court of King's Bench was of opinion, that the will was incomplete: *Right d. Cator v. Price*, Doug. 241. The case, however, was ultimately decided on another ground. But, where the will, which was written on three sides of a sheet of paper, concluded by stating, that the testator had signed his name to the first two sides, and had put his hand and seal to the last, but had omitted to sign the other sides, it was held, that the will was good. The signing the last sheet showed that the former intention had been abandoned: *Winsor v. Pratt*, 2 B. & B. 650; 5 Moo. 484, s. c.

*Proof of Attestation.*] It is not required by the statute, that the witnesses should see the deviser sign, or that he should sign in their presence. It is sufficient that he declare to the witnesses, that the instrument offered to them to be subscribed is his will, and that the signature is his handwriting: *Grayson v. Atkinson*, 2 Ves. 454; *Ellis v. Smith*, 1 Ves. Jun. 11; Dickens, 255, s. c. Although proof be necessary that the will was attested by the witnesses, in the presence of the testator, it is not necessary that such attestation should be stated on the face of the will: *Croft d. Dalby v. Pawlett*, Vin. Ab. tit. Devise, No. 9; Bac. Abr. tit. Wills, D. 2; *Price v. Smith*, Willes, 1, 4 Taunt. 217; and per *Ld. Eldon*, 6 Dow, 202. The attestation of an illiterate witness, by making his mark, is a sufficient subscription: *Harrison v. Harrison*, 8 Ves. Jun. 185; *Addy v. Grise*, ib. 504. Nor is it necessary that the will should be subscribed by the witnesses at the same time, Prec. in Chan. 185; nor in each other's presence. If, however, they attested several times, one witness will not be enough to prove the execution: *Cook v. Parson*, Prec. in Chan. 185. Where the deviser published his will in the presence of two witnesses,

who subscribed it in his presence, and, some time after, he sent for a third witness, and published in his presence, the will was holden to be duly attested, *Jones v. Lake*, 16 G. 2, B. R., on special verdict in ejectment: 2 Atk. 176, n. s. c.; admitted per *Ld. Hardwicke*, 2 Ves. 458; see, also, *Stonehouse v. Evelyn*, 3 P. Williams, 253; *Westbrooke v. Kennedy*, 1 Ves. & B. 362; *Ellis v. Smith*, 1 Ves. Jun. 11, and *Grayson* [\*933] *v. Atkinson*, \*2 Ves. 454; see *Peate v. Ougly*, Comyns, 197.

A will was signed by the testator, in the following manner,—“Signed, sealed, and published, as my last will and testament, in the presence of ———.” Two of the attesting witnesses were dead; the third swore, that he, with the other two, in the presence of testator, set their hands, as witnesses, to a paper produced by him, folded up; but witness did not see any of the writing, nor did testator say what it was, but he believed this to be the paper because he never witnessed any other paper for the testator, and added, that although the testator did not set his name or seal to the will, in their presence, yet he had often seen him write, and believed the whole to be in his handwriting. L. C. J. Trevor directed a jury to find the will well executed, and they did so. It seems, from *Stonehouse v. Evelyn*, that it is necessary that the testator should acknowledge to one of the witnesses, at least, that the signature is his handwriting. The witnesses need not attest every page, or know the contents, but all the will should be in the room at the time of the attestation; whether it is so or not, is a question for the jury: *Bond v. Seawell*, 3 Burr. 1773, 1 W. Bl. 407, s. c.; *Lea v. Libb*, 3 Mod. 262. Though there be no proof that testator saw the witnesses sign the will, his presence may be implied, if it be shown, that he was in such a situation that he might have seen them: as, where the witnesses were in one room and the testator might have seen them through a window in the adjoining room: *Shires v. Glasscock*, 2 Salk. 688; *Sir G. Sheen's case*, cited in Carth. 81. So, where testator was in bed, and might have seen through an open door into the next room: *Davy v. Smith*, 3 Salk. 395; *Todd v. Earl of Winchelsea*, 1 M. & M. 12. So, also, where testator sat in her carriage, from whence she might have seen into an attorney's office: *Casson v. Dade*, 1 Bro. Ch. Ca. 99; Bac. Ab. tit. Wills, D. 1. If, however, it be shown that, although, in one part of the room, the testator might have seen the attestation, yet if he was not in that particular spot, his presence is negative, and the execution has in such case been held bad: *Doe v. Mainfold*, 1 M. & S. 294; see, also, *Eccleston v. Petty*, Carth. 79, Comb. 156; 1 Sho. 89, Holt. 222; *Machell v. Temple*, 2 Sho. 288; *Langford v. Eyre*, 1 P. Wms. 740.

*Who a credible Witness within the Act.*] The witnesses must be persons who have the use of their reason, and such religious belief as to feel the obligation of an oath—who have not been convicted of any infamous crime, and are not influenced by interest: 1 Selw. N. P. 858.

Idiots, insane persons, and children, who upon examination by the court, appear to want understanding, are excluded as competent witnesses: Gilb. Ev. 109, Post, 939.

Any person who believes in God, the obligation of an oath, and a future state of rewards and punishments, is a credible witness: *Rex v. Taylor*, Pea. Rep. 11, per *Buller, J.*; Willes, 538; Post, 939.

Persons who have not been convicted of any infamous crime are com-

petent. Persons convicted of treason, felony, or any species of *crimen falsi*, as forgery, perjury, or subornation of perjury, are incompetent, Com. Dig. *Testament*, A. 3, 4, Com. Lit. 6, *b.*; and incompetent, and not credible, are synonymous: *Pendock v. Mackender*, 2 Wils. 18. By 31 G. 3, c. 35, an exception was made with regard to persons convicted of petit larceny, who were declared competent, notwithstanding. That statute, however, is repealed by 7 & 8 G. 4, c. 27, and by 7 & 8 G. 4, c. 29. The distinction between grand and petit larceny is abolished, so that all persons convicted of felony are incompetent. A conviction for bribing a witness to absent himself, *Clancey's case*, Fort, 209; for barratry, *R. v. Ford*, 2 Salk. 690; or for conspiracy, at the suit of the king, will render a witness incompetent: Co. Lit. 6, *b.* But a conviction for a conspiracy to raise the funds by false rumours does not, as it seems, render the party incompetent: *Crowther v. Hopwood*, 3 Stark. 21; but see 2 Dods.

174. A \*conviction for keeping a gambling-house does not dis- [\*934] qualify, *R. v. Grant*, 1 R. & M. 270; but a person convicted of winning by fraud, at certain games, seems rendered incompetent, by stat. 9 Anne, c. 14, s. 6, which enacts, that he shall be deemed infamous. Outlawry, in a penal action, does not render the party incompetent, Co. Lit. 6, *b.*, but it is otherwise of outlawry for treason or felony: 3 Inst. 212. To prove that the witness has been convicted of an infamous crime, a copy of the judgment, regularly entered upon the verdict of conviction, must be produced. The witness is not deprived of his legal privileges; nor is a conviction, unless followed by a judgment, sufficient to destroy his competency: *Lee v. Gansell*, Cowp. 3. Although, however, an offender be convicted, and judgment entered, yet if he obtain the king's pardon (except in the case of a conviction for perjury or subornation of perjury, under statute 5 Eliz. c. 9, which expressly deprives the king of this prerogative of pardon,) or suffer the punishment due to his crime, his competency is restored. Statute 6 G. 4, c. 25, s. 1, enacts that, in all cases in which the king shall be pleased to extend his royal mercy to any offender convicted of any felony, whereby the offender is excluded from the benefit of clergy and by warrant under the sign manual, countersigned by one of the secretaries of state, shall grant to the offender, either a free pardon upon condition of transportation, imprisonment, or other punishment, the discharge of such offender, in case of a free pardon, and the performance of the condition, in the case of conditional pardon, shall have the effect of a pardon under the great seal for such offender as to the felony of which he has been convicted—i. e. the effect of restoring his competency; and by s. 2, where any offender shall be convicted of any felony within the benefit of clergy, and shall endure the punishment to which such offender shall be adjudged for such felony, the punishment so endured shall have the like effects and consequences, as if he had been burned or marked according to the provisions of 4 H. 7, c. 13, 21. Jac. 1, c. 6, 3 W. & M. c. 9, 4 W. & M. c. 24, and 6 & 7 W. & M. c. 14, such burning in the hand being held to be in the nature of a statute pardon, B. N. P. 282, and having therefore the effect of restoring the party's competency. By 7 & 8 G. 4, c. 28, s. 6, benefit of clergy is abolished. In cases of non-clergyable felonies, before 7 & 8 G. 4, and therefore capital felonies, if the sentences have been executed, no question can ever arise as to witness' competency. If he obtain the king's pardon, or suffer the punishment which is to have the effect of branding, it is apprehended that, under 6 G. 4, c. 25, s. 1, his

competency would still be restored. Where the pardon is conditional, the performance of the condition must be proved: *Hawk: P. C. b. 2, c. 37, s. 45*. But, where a man has been sentenced to transportation, and confined in the hulks for the term, and discharged at the end of it, it will not destroy the effect of the pardon, that he has escaped twice, for a few hours each time; *post*.

An *interested* witness is not credible, in general: a devisee or legatee, under a will, was held incompetent, *Hilyard v. Jennings*, Carth. 514, *Anstey v. Dowsing*, Str. 1253, Hardw. 391, 2 Salk. 691, although a mere executor or trustee, who took no beneficial interest under the will was held competent, *Bettison v. Bromley*, 12 East, 250, *Lowe v. Jolliffe*, 1 W. Bl. R. 365, *Holt v. Tyrell*, 1 Barnard, 12, *Gross v. Tracy*, 1 P. Wms. 290; but doubts having prevailed, whether the term "credible" related to the time of attestation or to the time of proof, *Anstey v. Dowsing*, 2 Str. 1253, *Wyndham v. Chetwynd*, 1 Burr. 417, *Doe d. Hindson v. Kearsley*, 4 Burr. Ecc. L. 88, it was enacted by statute 25 G. 2, c. 6, s. 1, that if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, &c. except charges on lands, &c. for payment of any debt, shall be given or made, such devise, legacy, &c. shall be void, and such person shall be admitted as a witness to prove the execution of such will or codicil. By s. 2, a creditor, whose debt is charged [\*935] on lands, shall, notwithstanding\* such charge, be a competent witness. S. 3, a witness, whose legacy has been paid or accepted and released, or who shall have refused to accept such legacy, on tender made, shall be admitted as a witness. S. 5, a legatee dying in the lifetime of testator, or before he shall have received, or released, or refused to receive, his legacy, shall be a competent witness. S. 6, the credit of every such witness shall be subject to the consideration of the court and jury, as in all other cases. It is now decided, that one who is interested at the time of the execution, but discharges his interest previous to examination, is not a good witness: *Hatfield v. Thorp*, 5 B. & A. 589. One to whose wife the will gives an estate, in fee, after the determination of a life estate, is not a good witness within the statute, *ib.*, although the wife die after the death of the testator, before the determination of the life estate, and the witness survive the wife: *ib.* An executor, who takes no beneficial interest under the will, is a competent attesting witness to it, within the statute: *Phipps v. Pitcher*, 2 Marsh. 20-6; Taunt. 220. s. c. So, is the case of an acting executor, taking no beneficial interest under the will: *Bettison v. Bromley*, 12 East, 250. Where an attesting witness would take the same interest, either under a former will, to which he was not a witness, or under a latter will, he stands indifferent in point of interest, and is a good witness to prove the latter will. In ejectment against a devisee, an executor was called to support the will. It was objected that, although at the time of testator's death, the witness was indebted to him, his appointment as executor released the debt, and therefore, he was interested. Held, that the executor's pecuniary interest was no bar to his establishing the will, as to real property: *post; Wood v. Teague*, 5 B. & C. 385.

*Proof of Publication.*] This is necessary; but, it seems, the very act of signing the will, and causing it to be attested by witnesses, will suffice, for the statute does not require publication: see 3 Stark. Ev. 1689; Co. 197; 4 Burn. Ec. L. 117.

*Proof of Wills Thirty Years old.*] In a court of law, a will thirty years old, if the possession has gone under it, and sometimes without the possession, but always with it, if the signing is sufficiently recorded, proves itself: but, if the signing is not sufficiently recorded, it is a question whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, is cogent evidence to prove the duly signing, though it should not be recorded: *per* *Ld. Eldon, Ld. Rancliffe v. Parsons*, 6 Dow. 202, and see *Doe v. Lloyd*, Pea. Ev. App. 91. It seems that the thirty years should be computed from the date of the will, and not from the death of the testator: *McKenzie v. Frazer*, 9 Ves. 5; *Calthorpe v. Gough*, cited 4 T. R. 707; *Stark. Ev.* 1694. It is no objection to a will more than thirty years old being read in evidence, that possession has not followed it, because the court cannot know how the will directs the possession to go, till it is made acquainted with the contents of the will by its being read: *Doe d. Lloyd v. Passingham*, 2 C. & P. 410.

*Proof of will of COPYHOLD Property.*] Copyhold lands are not, properly, the subject of devise. Formerly, if a man would devise a copyhold estate, it was necessary to surrender it to the use of his will; and, upon this surrender, the will operated as a declaration of the use, and not as a devise of the land: 1 Atk. 388. Hence, a will to pass copyholds, need not be signed with the same solemnities as a devise of freehold, nor signed at all, unless the signature be made necessary to the terms of the surrender: *Tuffnell v. Page*, 2 Atk. 37; *Wagstaff v. Wagstaff*, 2 P. Wms. 258. A draft of, or instructions for, a will, have been held sufficient to direct the uses of a surrender, *Carey v. Askew*, 2 Br. C. 319, *Doe v. Danvers*, 7 East, 299, 324; but, by the 55 G. 3, c. 192, it is enacted, that \*the disposal of copyhold estates by will shall be effectual, [\*936] without a previous surrender to the use of the will. The statute, however, supplies only the want of a formal surrender. Where the surrender is matter of substance, it is still necessary. Thus, when the custom of a manor enabled a *feme covert* to pass, by her will, copyhold lands, which had been surrendered to the use of the wife's will by the husband and wife (the wife being examined by the steward separate and apart from her husband, and consenting) and a *feme covert*, being seized of copyhold lands in the manor, made her will subsequently to 55 G. 3, c. 192, and there was no surrender to the use of the will, it was held, that the copyholds did not pass under the will, the surrender being matter of substance, and requiring to be accompanied by the separate examination of the wife: *Doe d. Nethercote v. Barth*, 5 B. & A. 492. After production and proof of the will the claimant must prove the admittance of the testator; as also his own admittance; for, till admittance, although after the surrender, the legal estate remains in the surrenderer, and descends to his heir: *Roe v. Root*, 5 East, 137; *Roe v. Hicks*, 2 Wils. 15; *Cro. El.* 148; *Holdfast v. Clapham*, 1 T. R. 600; *Doe v. Hall*, 16 East, 208; *Com. D. Copyhold, D. 2*; *Wilson v. Weddell*, Yelv. 144.

*PAROL EVIDENCE, when admissible to explain a Will.*] Where there is a latent ambiguity with regard to a will—that is, an ambiguity arising from extrinsic evidence, parol evidence is admissible to explain it, 3 *Stark. Ev.* 1021, as where there are two persons or two estates of the same

name; *Jones v. Newsam*, 1 W. Bl. 60; *Ld. Cheney's case*, 5 Rep. 586. Where the testator gave £100 to the four children of Mrs. B., and it appeared that she had four children by Mr. B., and two by Mr. P., her first husband, a declaration by testator that he had provided for the four children of Mrs. B. but would give nothing to P.'s children was admitted, to show who were meant by the description of the four children in the will: *Hampshire v. Pearce*, 2 Ves. 216. If a person grant his manor of S. generally, and he has two manors, N. S., and S. S., parol evidence is admissible to show which he meant: *Bac. Elm. Rule*, 23. Where property was given to A. and B., legitimate children of C. D., it was held A. and B., the illegitimate children of C. D., were entitled to take: *Standen v. Standen*, 2 Ves. Jun. 589. So, a grant made to William, Bishop of Norwich, the name of the Bishop being Richard (the intention being apparent,) was held good. Where a will was made in favour of Catharine Eardley (no such person appearing to claim the legacy,) parol evidence was admitted to prove the testator, dictating his will, said Gatty Eardly, which the writer mistook for Katty, but which was, in fact, the testator's contraction for Gertrude, and that Gertrude Eardly was the person meant: *Beaumont v. Fell*, 2 P. Wms. 141; see, also, *Downt v. Sweet* Amb. 175; *Bradwin v. Harper*, Amb. 174. In general, where there is any doubt as to the extent of the subject devised, it is matter of extrinsic evidence to show what is included under the description, as parcel of it: *Doe d. Bush* 1 T. R. 701; *Kerslake v. White*, 2 Stark. 508; *Hubert v. Row*, 16 Ves. 481; *Doe d. Brown v. Brown*, 11 East, 441; *Whitbread v. May*, 2 B. & P. 593; *Goodtitle d. Radford v. Southern*, 1 M. & S. 299. Under a devise to R. P., of all that my freehold, messuage, &c., situate, &c., now in the occupation of J. E., a coal-cellar, within the boundary of the premises devised to A. P., had always been used by the testator, and was, at the time of the will, in occupation of R. P., it was held, that evidence of such occupation by him was conclusive, although it was proposed to show that the cellar was situate within the boundary line of the house devised to A. P., and therefore, that it was passed to R. P. under the will: *Press v. Parker*, 10 Moo. 158. But, where a subject-matter exists, which satisfies the terms of the will, and to which they are

[\*937] \*perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object: *Ld. Walpole v. Ld. Cholmeley*, 7 T. R. 138; *Doe d. Sir A. Chichester v. Oxenden*, 3 Taunt. 147. Patent ambiguities, such as arise upon the face of the will, cannot be removed by the aid of extrinsic evidence. Different parts of the will may be compared together, and that which is uncertain may be explained by that which is certain; but, if the ambiguity still remains unexplained, the will is void: were it otherwise, it would enable witnesses to make wills for testator: *per Lord Hardwicke*, in *Baylis v. Atty.-Gen.*, 2 Atk. 239; *Castleton v. Turner*, 3 Atk. 257. In some instances, nevertheless, where the terms of a will have been doubtful, extrinsic evidence has been admitted, to assist the construction: thus, where there was a blank for devisee's Christian name: *Price v. Page*, 4 Ves. 680. So, in a case of a devise to Mrs. C., the chancellor referred it to the master to show the person intended: *Abbot v. Massie*, 3 Ves. 148: and see *Fonnerau v. Poyntz*, 1 Bro. C. C. 472; *Masters v. Masters*, 1 P. Wms. 420; *Smith v. Doe d. Ld. Jersey*, 2 B. & B. 473.



*Vacation of Will by Revocation.*

*Proof of, by subsequent Will or Codicil.]* *Prima facie* evidence of a will may be rebutted by proof of revocation. The sixth section of the Statute of Frauds enacts, that no devise of lands, &c., shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, signed in the presence of three or four witnesses, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent.

To prove a revocation by a *subsequent will*, the second will must be executed according to the provision of the fifth section of the statute: *Eccleston v. Speake*, 1 Show. 89; *Onyons v. Tyrer*, 1 P. Wms. 343; *Limbery v. Mason*, Com. 454. If the second will do not expressly revoke the first, it does so only in so far as it is clearly inconsistent with the first; and, if testator destroy the second will (the first still existing,) the first is thereby revived: *Harwood v. Goodright*, Cowp. 91; *Glazier v. Glazier*, 4 Burr. 2512, cited by *Buller, J.*, Doug. 40. In a late case, three codicils, of different dates, were endorsed on a will duly attested for passing real property:—the first referred to lands mentioned in the will,—made a disposition of lands purchased subsequently to the will, according to directions in the will as to the devisor's lands in general,—gave a legacy to devisor's wife, and appointed her executrix: in addition to the executors named in the will, it was attested by only two witnesses. The second, which also was attested by only two witnesses, referred to lands mentioned in the will—gave directions touching the sale of a portion of them,—revoked a legacy given by the will, and appointed two new executors in the room of those mentioned in the will. The third merely appointed a new executor in the room of the executor named in the second codicil, and was attested by three witnesses. It was held, that the third codicil operated as a republication of the first: *Guest v. Willasy*, 3 Bing. 614.

To prove a revocation by some *other writing*, signed in the presence of three or four witnesses, the testators must have signed in the presence of the witnesses, but the act does not require, as in the fifth section, that they shall sign in his presence, 1 P. Wms. 345; nor is their signature necessary at all, 8 Vin. Ab. *tit. Devisee*; although it must be shown that they were present. The latter words of the clause relate to the words *other writing*, and not to the word will; a complete execution, therefore, according to the fifth section, is necessary in the case of a will or codicil, and such will may be complete, and take effect as a revocation, though \*testator does not sign in the presence of the witnesses: [\*938] *Stoil v. Clarke*, 3 Mod. 218; *Ellis v. Smith, ib., in notes*, 4 Burn, *Eccl. L.* 199.

*Proof of Vacation by Cancelling, Implication, &c.]* The act of burning or tearing must be done with the intent to cancel, *Burtenshaw v. Gilbert*, Cowp. 52; and, though such act do not affect a complete destruction, if the intent be apparent, the will will be void: *Windsor v. Pratt*, 2 B. & B. 650; *Doe d. Perkes v. Perkes*, 3 B. & A. 489; *Bibb v. Thomas*, 2 W. Bl. R. 1043; *Sir Ed. Symons's case*, Com. 453; *Titner v. Titner*, 3 Wils. 508. No violence will operate as a revocation, where the party

was of unsound mind at the time of the act: *Senbery v. Fordham*, 1 Ph. Rep. 74. Declarations of the testator at the time of committing the act, and his subsequent declarations respecting it are admissible: *Burtonshaw v. Gilbert*, Cowp. 53; 2 East, 534.

A will may be revoked by *implication*. Thus, the subsequent marriage of testator, and the birth of a child, without provision, operate as an implied revocation: *Doe d. Lancashire v. Same*, 5 T. R. 58; see 2 East, 538; *Brady v. Cubitt*, Doug. 30; and *Christopher v. Christopher*, 4 Burr. 2171; *sed vide* 3 Stark. Ev. 1716. The operation of a will, as to particular property, may be defeated, by showing that it was purchased after the execution of the will, or that subsequently to the execution, he levied a fine, *Parker v. Biscoe*, 3 Moo. 24, 1 Saund. 277, n. (4); or suffered a recovery, *Doe d. Lushington v. Bishop of Landaff*, 2 N. R. 491, of lands, which he had at the time of the execution of the will, for he thereby takes a new estate. If a testator, having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making a new will, the will made prior to the fine is revoked: *Doe d. Dilnet v. Dilnet*, 2 N. R. 401. If the testator bequeath a lease, and afterwards renew it, the new lease will not pass, *Coleby v. Manby*, 6 Mod. 84; *James v. Dean*, 15 Ves. 238, *Marwood v. Turner*, 3 P. Wms. 103; unless it can be collected from the will, that the testator intended that the legatee should take the lease then subsisting, or any which he should afterwards take: *ib.* Where a party, having surrendered copyhold lands to the use of his will, afterwards surrenders the same lands to the use of his marriage-settlement, the latter surrender does not revoke the former: *Vawser v. Jefery*, 3 B. & A. 462.

The admissibility of *parol evidence*, to rebut the presumption of revocation, is subject to great doubt: see, on the one hand, *Ld. Kenyon's* observations in *Doe d. Lancashire*, and of *Ld. Alvanley*, in *Gibben v. Gaunt*, 4 Ves. 848, and of the *Ld. Chancellor* in *Kennebel v. Snafston*, 5 Ves. 664; in opposition to such evidence, on the other hand, the opinion of *Eyre, C. J.*, in *Goodtitle v. Otway*, 2 H. B. 522; *Lugg v. Lugg*, *Ld. Raym.* 441, and *Brady v. Cubitt*, Doug. 31.

*Proof of Vacation by Forgery, Fraud, &c.*] The will may be shown to be void, by proving it is a forgery; or that it was fraudulently obtained, as the substitution of a false instrument for the one which the party intended to execute, *Doe v. Allen*, 8 T. R. 147; or made under duress, *ib.*; or that the testator was incompetent to make a will, by reason either of coverture, infancy, 34 & 35 H. 8, c. 5, s. 14, or want of sound mind or understanding; *Winchester's case*, 6 Rep. 23, a.

*Proof of Want of Capacity to vacate the Will.*] All persons who have not sufficient understanding to manage their own affairs, whether from natural weakness, from old age, drunkenness, lunacy, or from what cause whatever such failing proceeds, is immaterial, cannot make a will: *Ex parte Cranmer*, 12 Ves., Jun. 455; *Ex parte Gilham*, 2 Ves., Jun. 587; *Ex parte Barnsley*, 2 Atk. 167; 1 Bl. Com. 304; *Ridgway v. Darwin*, \*8 Ves. 67. If derangement be proved, and a lucid interval be alleged to have taken place, the burden, in order to establish the will, attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period when the act

was done to which the lucid interval refers: *Att. Gen. v. Parnter*, 3 Bro. C. C. 443; *White v. Driver*, 1 Phil. 88; *Cartwright v. Cartwright*, 1 Phil. 90. A *feme covert* may dispose of property by the will she holds in *autre droit*, as executrix, *Scammel v. Wilkinson*, 2 East, 552; or, under a power contained in a marriage-settlement, *Driver v. Thompson*, 4 Taunt. 294. And in equity, if she has a separate estate, she may make a will without a power: *per Mansfield, C. J.*, 4 Taunt. 297.

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## WITNESSES.

THE rules of law respecting the evidence of witnesses, relate either to—1, their competency; 2, the manner of conducting their examination; or 3, of compelling their attendance.

1. **COMPETENCY.]** All persons whatsoever may be witnesses, excepting such as are incompetent through—1, defect of understanding; 2, of religious principle; 3, through crime or infamy; 4, interest in the suit, or, 5, their relation to the parties; *Jordain v. Lashbrook*, 7 T. R. 610.

**Want of Understanding.]** Idiots, the insane, and lunatic, and children uninformed of the obligation of an oath, are incompetent to be witnesses; but a lunatic may be examined in a lucid interval, *Com. D. Test, A.*, B. N. P. 293; as may children of any age, if capable of distinguishing between good and evil: *Brazier's case*, 1 East, P. C. 443; 1 Leech, Cr. Cas. 234; *Gilb. Ev.* 130. The old rule was to consider their age the criterion, and admit from under ten, but none under nine years. 2 Str. 700; 1 Hal. P. C. 302; 2 *ib.* 278. The more reasonable rule of judging of their competency, not by age, but their apparent sense and understanding, is now adopted in both civil and criminal cases: 1 Phil. Ev. 19. When a child cannot be sworn, the account it may have given to others, ought not to be admitted: *Rex v. Tucker*, 1 Phil. Ev. 19. The deaf and dumb may give evidence by signs, through an interpreter: *Rustin's case*, 1 Leach, Cr. C. 445.

**Want of Religious Principle.]** Jews, Turks, and Heathens, contrary to the opinion of *Ld. Coke*, Co. Lit. 6, b. and *Serg. Hawkins*, Haw. P. C. b. 2, c. 46, 3148, are now held competent witnesses, *Omichund v. Barker*, Willes, 549, 1 Atk. 21; and are to be sworn according to the ceremonies of their religion respectively; *Atcheson v. Everett*, Cowp. 390; Jews, upon the Pentateuch, *ib.*; Mahometans on the Koran, *Morgan's case*, 1 Leach, Cr. C. 64; Cowp. 390; 2 Str. 1104. So sectarians who scruple to kiss the gospels may be sworn, by holding up their right hand: 2 Sid. 6; 1 Leach, Cr. C. 459; *Pea. N. P.* 22; Cowp. 390. But atheists, and such infidels as profess no religion that can bind their consciences to the truth, are excluded from being witnesses: B. N. P. 292. *Gilb. Ev.* 129. It is not enough that a witness believes himself bound to speak the truth from regard to character, the common interest of society, or fear of punishment, *Ruston's case*, Leach, C. C. 455; he must believe

that there is a God, and a future state of rewards and punishments, and that he imprecates upon himself divine vengeance, if false: *White's case*, *ib.* 482; 1 Atk. 19, 48; 1 Phil. Ev. 21. Yet, the proper mode of trying his competency is to inquire, not into his particular opinions, \*as whether he believes in Jesus Christ, but whether in God and a future state: *R. v. Taylor*, Pea. Rep. 11: 1 Phil. Ev. 24. And it seems sufficient if he believes in a God who will reward or punish him in this world: *Omichund v. Barker*, Willes, 550. If a witness consider the oath taken to be binding on his conscience, it would be irrelevant to ask him whether there be any other mode more obligatory: *the Queen's case*, 2 B. & B. 284. Quakers are permitted, by *st.* 7 & 8 W. 3, *c.* 34, to give evidence by affirmation, without oath, in civil cases; in criminal, they are still incompetent, because they refuse to swear in any form, and the law, with the above exception, requires all testimony to be given on oath. Their affirmation, according to the statute is admissible, in penal actions, as for bribery at elections, *Atcheson v. Everett*, Cowp. 382; a motion for attachment for non-performance of an award, Cowp. 394, And. 200, to quash an appointment of overseers, 2 Str. 1289, in an appeal for murder, *ib.* 856, Cowp. 392; motion for an information for a misdemeanor, 2 Str. 872, 2 Burr. 1117; exhibiting articles of the peace, 1 Str. 527; motion for non-performance of an order of court: Willes, Rep. 291, *n. b.* And, where an application is made to the court against a Quaker, his affirmation may be received in his own defence, though the proceeding be of a criminal nature: *R. v. Shaklington*, And. 201, *n.*; *R. v. Gardner*, 2 Burr. 117; Cowp. 383, 392. Excommunication is now no objection to the competency of a witness: *stat.* 53 G. 3, *c.* 127, *s.* 2, 9; Phil. Ev. 26.

*Incompetency from Crime or Infamy.*] By the 9 G. 4, *c.* 32, *s.* 3, it is enacted, that every punishment for felony, after it has been endured, shall have the effect of pardon under the great seal; and, as the effect of a pardon is to restore the competency of a party as a witness, *Com. D. Test. A.* 3-4, he will be admissible, on proof of that fact: *post*, 941. And by *s.* 4 of the above act it is enacted, that misdemeanor, except perjury, shall render a party an incompetent witness, after he has undergone the punishment.

The only infamy which formerly rendered a witness incompetent, was a conviction and judgment for an infamous crime, *infamia juris*, depravity of character, or *infamia facti*, which effected only his credibility: see 1 Phil. Ev. 27; Gib. Ev. 126; B. N. P. 291. Infamy consists in the character of the crime, and not of the punishment: *Pendock v. Mackender*, 2 Wils. 18. The following are held to be infamous crimes: treason, and felony of every species, *Co. Lit.* 6, *b.*, *Com. D. Test.*; (except petit larceny, by the *stat.* 31 G. 3, *c.* 35); the *crimen falsi*; of whatever description, as forgery, perjury, subornation of perjury, attain of false verdict, *ib.*, 2 H. P. C. 277; and see the case of *Ville de Varsovie*, 2 Dods. Adm. Rep. 174; præmunire, barratry, *R. v. Ford*, 2 Salk. 690, B. N. P. 292; bribing a witness to absent himself, *Clancey's case*, Fort, 209; conspiracy at the suit of the king, to indict another for a capital offence, *Co. Lit.* 6, *b.*, 11 Esp. Rep. 99, *a.*, H. P. C. 277, Haw. P. C. *b.* 1, *c.* 72, *s.* 9; *R. v. Crossley*, 2 Leach, C. C. 496, crimes declared infamous by statute, as winning by fraud at certain games, contrary to the *stat.* 9 Anne, *c.* 14,

s. 5; *Forts.* 208, *Co. Lit.* 6, *b.*; outlawry for an infamous crime, appearing by the sheriff's return of the exigent, for that has the same effect as conviction and judgment: 3 *Inst.* 212; *Haw. P. C. b.* 2, *c.* 48, *s.* 22: *Colin's case*, Sir T. Raym. 369. But conviction of a conspiracy to raise the funds by false rumours does not render a witness incompetent, *Crowther v. Hopwood*, 3 *Stark.* 21; nor does attain of a conspiracy at the suit of a private party, 2 *H. P. C.* 277, *Saville v. Roberts*, *Carth.* 416; nor conviction for keeping a gambling-house, *Co. Lit.* 6, *b.*; nor conviction of a libel, trespass, or riot, *Gilb. Ev.* 127, *Fortesc. Rep.* 309, 3 *Lev.* 426; nor outlawry in a personal action: *Co. Lit.* 6, *b.* But now, by stat., incompetent witnesses cannot make affidavits to charge others; but, to exculpate or defend themselves, their affidavits have been admitted: *Davie and Carter's case*, 2 *Salk.* 461; 2 *Str.* 1148. The conviction and judgment can only be \*proved by record, or a copy: *R. v. [941] Castle*, 8 *East.* 79. Even the witness' admission, that he was imprisoned under such judgment, *ib.*, or had been guilty of perjury on another occasion, *R. v. Seele*, 11 *East.* 309, *Rands v. Thomas*, 5 *M. & S.* 246, is not sufficient to affect his competency, however it may injure his credit. If the conviction was had in a foreign court, the proceeding must appear to be regular, and be regularly proved; 1 *Phil. Ev.* 30; *ante*, 524. A record without a caption, to show the authority of the court, is imperfect; and the indictment must state all essential circumstances: *Cooke v. Maxwell*; 2 *Stark.* 184.

*Incompetency from Infamy, how removed.*] Witnesses, incompetent from infamy, might be restored to competency by two means, purgation or pardon; instead of purgation, the stat. 18 *El.*, *c.* 7, *s.* 3, substituted allowance of clergy and burning in the hand. In such cases, it must be shown, not only that clergy was allowed, but the burning done, 1 *Phil. Ev.* 32, unless the convict be a clerk in orders, or a peer, or the branding pardoned or commuted, and the fine, or other substituted punishment, suffered: *Burridge's case*, 3 *P. Wms.* 485; *Lord Warwick's case*, 5 *St. T.* 2 *ed.* 172. By stat. 6 *G.* 4, *c.* 25, *s.* 2, where any convict of felony, within benefit of clergy, shall endure the punishment adjudged, such punishment shall have the same consequence as burning in the hand, according to the stats. 4 *H.* 8, *c.* 13, 21 *Jac.* 1, *c.* 6, 3 *W. & M.* *c.* 9, 4 & 5 *W. & M.* *c.* 24, 6 & 7 *W. & M.* *c.* 14. And such burning in the hand is in the nature of a statute pardon: *B. N. P.* 292. A pardon, whether by act of Parliament or under the great seal, restores a witness to competency: see *Com. D. Test. A.* 3-4. If it be conditional, the performance, of the condition must be shown: *Hawk. P. C. b.*, 2, *c.* 37, *s.* 45. But to have escaped twice, for a few hours, from the hulks, is no breach of the conditions, where a man has been sentenced to transportation, and confined in the hulks for the term, and discharged at the end of it: *R. v. Badcock*, *R. & S. C. C.* 248. The pardon must be proved by the great seal: the privy seal, or sign manual, being countermandable, are not sufficient: *Gully's case*, *Leach, C. C.* 116; 2 *W. Bl. R.* 797. But now, by the above stat. 6 *G.* 4, *c.* 25, *s.* 1, where the king extends his mercy to any convict of felony, excluded from the benefit of clergy, and, by warrant under the sign manual, grants him either a free or conditional pardon, the discharge of such convict out of custody in case of a free, and the performance of the conditions in case of a conditional, pardon, shall

have the effect of a pardon under the great seal. But the king's pardon will not make a witness competent, where the incompetency is made part of the punishment by a statute, which provides that he shall never be admitted to give evidence until the judgment be reversed, as in case of perjury or subornation of perjury, under the stat. 5 Ed. c. 9, 1 Phil. Ev. 24, B. N. P. 292, Holt, 135, 2 Salk. 155, *ib.* 689.

*Incompetency from Interest.*] It was formerly held that, if a witness had an interest in the question put to him, he was incompetent. A distinction is now made between interest in the question, and interest in the event of the suit; and, however the former may injure his credit, the latter only can affect his competency: *Walton v. Shelley*, 1 T. R. 300; *Bent v. Baker*, 3 T. R. 32; *R. v. Bray*, Cas. temp. Hardw. 360; 7 T. R. 603. A witness is interested in the event of the suit, and is incompetent, when either the verdict can be evidence for or against him in any future cause, or there is any certain and immediate loss or benefit accruing to him in consequence of the present: *Carter v. Pearce*, 1 T. R. 164; Gilb. Ev. 106; B. N. P. 284; 4 T. R. 17; 7 *ib.* 62; *King v. Baston*, 4 East. 582. As, in an action against the master for the negligence of his servant: *Green v. N. R. Comp.*, 4 T. R. 509; 2 Ld. Raym. 1007;

*Miller v. Falconer*, 1 Camp. 251; 15 East. 474; 3 Camp. 516; [\*942] *Marsh v. Foote*, 8 Taunt. 454; *Rotheroe v. Elton*, Pea. Rep. 3 *ed.* 117. In an action against the principal for negligence, in the course of a broker's employment, the servant and broker are incompetent to disprove the negligence, for the verdict would be evidence against them of the amount of damages in subsequent actions by the master or principal: *Geners v. Mainwaring*, Holt, 139. In an action against the sheriff for a false return, which was that money was paid for arrears of rent, the landlord is not competent to prove rent was due; for, if the judgment be here given for the plt., it will be evidence of damage for the sheriff against the landlord: *Keightley v. Birch*, 3 Camp. 521. In ejectment, the tenant in possession, upon whom the declaration was served, is not competent to support the deft.'s title under whom he holds, for he is liable for mesne profits, and this judgment would be evidence against him: *Doe v. Williams*, Cowp. 621; 1 Str. 632. Nor is a witness, to whom the lessor of the plt. has promised to demise the lands, if recovered; for, in an action for not performing that promise, the verdict here would be evidence of the recovery: Gilb. Ev. 122. Nor one who is to repay money to plt., if he fails, but not if he succeeds, for the same reason: *Fotherington v. Greenwood*, 1 Str. 129; and see *Forrester v. Pigou*, 1 M. & S. 9. Nor, upon an avowry for rent due from A. B., is A. B. competent to prove that the plt., who was his under tenant, had agreed to pay the whole rent mentioned: *Upton v. Curtis*, 1 Bing. 210. In trespass against the sheriff for taking plt.'s goods under an execution against A. B., A. B. is not competent to prove the goods his, since a verdict for the deft. would discharge his debt: *Bland v. Ansley*, 1 N. R. 331. In an action on insurance of goods, the owner of the ship is not competent to prove for the freighter that the ship was seaworthy, until released: *Rotheroe v. Elton*, Pea. Rep. 117. No witness can support a modus, who would be subjected to tithes, if the plt.'s claim prevail: *Ld. Clanricard v. Lady Denton*, 1 Gwill. 360; Gilb. Ev. 113. Nor can any support a custom who claims under it, as an occupier of land in

the same parish, to establish the custom of the out-going tenant's taking the away-going crop: 1 Phil. Ev. 54. In an issue whether the proprietors, within a chapelry, are by custom, liable to repair the chapel, such a proprietor is not a competent witness, although his property is in the occupation of a tenant, who is to pay rent without any deduction: *Rhodes v. Ainsworth*, 1 B. & A. 87. In an action for exercising a trade in breach of custom which confined that and other trades to members of a corporation, a witness who claims a right to exercise a trade there, though not a member, is not competent to negative the custom: *Company of Carpenters in S—— v. Hayward*, 1 Doug. 373. Where a right of common is claimed by custom, one who claims under the same custom cannot be a witness, as the verdict would be evidence in a similar action for himself: 1 T. R. 303; 3 T. R. 52; B. N. P. 283; *Hockley v. Lambe*, 1 Ld. Raym. 731. So, in an action at the suit of one claiming common by prescription, for not repairing contiguous fences, others claiming similar right of common are not competent witnesses, for the record will be evidence for them, also, that the deft. was bound to repair: *Anscomb v. Shore*, 1 Saund. 261. So all persons liable to contribute to deft. for damages: *French v. Backhouse*, 5 Burr. 2727. But in an action against the surety of a collector of rates, to recover sums received, and not paid over by the collector, an inhabitant of the place is admissible *ex necessitate* to prove payments to the collector, although in the event of the party's failing to make good the deficiency he would be liable to a fresh assessment: *Middleton v. Frost*, 4 C. & P. 16.

All persons are incompetent witnesses in any action for the costs of which they are liable. Thus, the deft.'s bail are not competent, *Piesley v. Von Esch*, 2 Esp. Rep. 606, *Brown v. Neave*, Wightw. 406, 1 T. R. 164; though they have not justified, if the recognizance be not discharged, *Hawkins v. Inwood*, 4 C. & P. 148; nor the wife of such bail, *Cornish v. Pugh*, 8 D. & R. 68; nor a person who has voluntarily paid money to the sheriff in lieu of bail: *Locon v. Higgins*, 1 D. & R. N. P. C. 46. So, the sheriff's officer, who has given security for the due execution of processes, is not competent to prove, in an action for a false return against the sheriff, that he endeavoured to make the arrest: *Powell v. Hord*, 2 Ld. Raym. 1141; 1 Str. 450; 3 Camp. 523. The prochein ami and guardian of an\* infant plt. are liable to costs, and incompetent witnesses: [\*943] *James v. Hatfield*, 1 Str. 158; 2 *ib.* 1026; Gilb. Ev. 107; 3 Atk. 511. So, if it be proved in assumpsit that the goods were sold to the deft. and J. S., deft. may not call J. S. to prove that the goods were sold to himself, for he is liable to contribute for costs: *Goodacre v. Breame*, Pea. Rep. 174. In an action by an endorsee against the acceptor of a bill for the accommodation of the drawer, the drawer is not competent to prove the consideration of the endorsee usurious; for, if the endorsee fail in this action, though the drawer will be liable to pay him the value of the bill, yet, if the acceptor fail, the drawee is not only liable to indemnify him for the value of the bill, but also for costs of this action: *Jones v. Brooke*, 1 Taunt. 464. And this case seems to overrule those of *Ilderton v. Atkinson*, 7 T. R. 480, and *Birt v. Kirkshaw*, 2 East, 458, in which it had been held, that where the witness was liable to pay the principal sum to which-ever of the parties failed, the additional liability to pay the costs also, upon the failure of one, was too remote an interest to render the witness incompetent for that party: see 1 Phil. Ev. 59. So, in an action by the endorsee

against the maker of a promissory note, the payee and endorser, become bankrupt since the date, and certificated, is not competent to prove, for the maker, that the note was made for the witness' accommodation, and endorsed after due; for, though his certificate has discharged his liability as endorsee, he will still be liable to the accommodation maker, if obliged by this action to pay the note: *Maundrell v. Kennett*, 1 Camp. 408. And where the question was, whether a bill had been delivered by A. B. to the plt., to be discounted for deft., or given to plt. for goods sold to A. B., it was held, that A. B. was not competent to prove for the deft. the former of these facts; if the latter be true, and a verdict accordingly given for the plt. A. B. will be liable to pay the deft. the costs of this action, as special damages for his breach of duty: *Harman v. Lastrey*, Holt, 390.

The surety may not call his principal to prove the condition unbroken: *Rex v. Horton*, 4 Price, 150. In an action by D. against C. for money expended for B., A., who is bound to indemnify B. for those expenses, is an incompetent witness: *Trelawney v. Thomas*, 1 H. Bl. 303. Also, in ejectment, where the plt. has made out a *prima facie* case against the deft., as tenant in possession, a witness called by deft. is not competent to prove himself the real tenant, for the verdict would have the effect of turning him immediately out, than which his liability for mesne profits is a remoter interest: *Doe v. Wilde*, 5 Taunt. 193; 1 Marsh. 7; *Doe v. Bingham*, 4 B. & A. 672. "If a person, who is under no obligation to become a witness for either of the parties to the suit, choose to pay his debt beforehand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event as if he were a party to a consolidation rule:" *per Ld. Ellenborough*, *Forrester v. Pigott*, 1 M. & S. 9.

An agent of a party cannot be a witness on his behalf; *Nash v. Cox*, Loft, 600. A person who bought the goods in his own name, is not competent to prove that he bought them as agent for deft., *Robertson v. French*, 4 Esp. Rep. 246; *Ripley v. Thompson*, 12 Moo. Rep. 55; nor a person to whom the goods were furnished on the deft.'s credit, to prove for the plt. the value of the goods; *Wright v. Wardle*, 2 Camp. 200; nor one who has obtained a judgment against an executor, to prove it, *bona fide*, where to a plea of that judgment, and *plene administravit ultra*, the plt. has replied *per fraudem*: *Campion v. Bentley*, 1 Esp. Rep. 343. So, a witness who has a power of attorney from the plt. to sue for him, and who expects to pay his own debt out of the money in question: *Powell v. Gordon*, 2 Esp. Rep. 735. So, the garnisher, under a foreign attachment, who has received the money, is inadmissible to prove the regularity of the proceedings, or the justice of his demand: *Ld. Barrymore v. Taylor*, 1

Esp. Rep. 327. So, also, an insolvent, to recover money which [ \*944 ] is to go to the general fund, in an action by his assignees: *Rudge v. Ferguson*, 1 C. & P. 253; *Delafield v. Freeman*, 4 C. & P. 67. In a *qui-tam* action, for an usurious loan to the bankrupt, before bankruptcy, the bankrupt cannot prove the usury, unless he has repaid the money, or obtained his certificate, though the demand for the loan has been proved under the commission, and the bankrupt is ready to release all benefit; *Masters v. Drayton*, 2 T. R. 496. And it is a general rule, that a bankrupt is incompetent to prove any fact in support of his commission though he has obtained his certificate, and released his surplus and allowance, *Field v. Curtis*, 2 Str. 829, *Chapman v. Gardner*, 2 H. Bl. 279; but, after obtaining his certificate, and releasing his surplus, he is com-



petent to prove the handwriting of the commissioners, upon which the validity of the commission does not depend: *Morgan v. Pryor*, 2 B. & C. 14; 3 D. & R. 215. In an indictment for perjury, the party who lost the verdict, in consequence of that perjury, is inadmissible, until he has paid the debt and costs: *R. v. Eden*, 1 Esp. Rep. 97. A person is not competent to impeach a security which he has given, though not interested in the event of the suit: *Walton v. Shelley*, 1 T. R. 296. It has been ruled that A. whose name has been registered as the part-owner of a vessel, on the oath of D., and has afterwards conveyed such share to B. by deed, covenanting for his good title, cannot call B. to prove that he had no interest in the vessel, *Nickson v. Thomas*, 1 Stark. 85, but this decision seems overruled by *Rands v. Thomas*, 5 M. & S. 244, where, on the authority of *R. v. Seale*, 1 Stark. 85, it was held, that B., in such a case, was a competent witness. In trover for a deed, the deft. admitting that he held it at the request of J. S., for certain purposes, J. S. was considered an incompetent witness: *Harrison v. Vallance*, 7 Moo. 304. A devisee, who takes an interest under a will, is not competent to prove its execution, or the sanity of the testator, see *Pyke v. Crouch*, 1 Ld. Raym. 730, *Hilliard v. Jennings*, *ib.* 505, 1 Phil. Ev. 60; nor is a remainder-man, to prove the title of the land: *Smith v. Bleckham*, 1 Salk. 283; Sayer, 45; 1 Ld. Raym. 730. In an action for obstructing a water-course, a person claiming a right to use it is not competent: *Jebb v. Povey*, 2 Esp. Rep. 679. A direct interest will render the witness incompetent, however small and inconsiderable: as in trespass, the question being whether a corporation, which had inclosed part of the common, had left sufficient for the commoners, a freeman is insufficient to prove the affirmative, because the rent must have been for the use of the corporation: *Bucton v. Hinde*, 5 T. R. 174; 2 Vern. 317. And it has been held, that a witness, who had a remedy by action whichever party gained the verdict would still be interested, if there were greater difficulty in enforcing that remedy in the one case than the other, *Buckland v. Jankard*, 5 T. R. 579; but see 1 Phil. Ev. 68, where it is suggested, that such circumstances would now be more properly considered as affecting his credibility than his competency. On an indictment against a township for not repairing a highway, an inhabitant of another township, in the same parish, is not competent even to prove the road a common highway, for, if the prosecution succeeds, it will have the effect of discharging the other townships of the parish. And an incompetent witness cannot be asked any question for the party to which his interest inclines him: 1 Phil. Ev. 64.

*What Interest will not disqualify.*] One of the leading cases upon this subject is that of *Bent v. Barker*, in which it was decided, that an underwriter, on a policy of insurance, was a competent witness in an action against another: 3 T. R. 27; B. N. P. 283. If a witness has an equal interest with both parties, he is competent for either, as to prove money paid by the deft. to him as agent for plt., since he is then liable to one of the two: *Ilderton v. Atkinson*, 7 T. R. 480. So, the lessor, whose title is admitted, may prove whether the plt. or another was his tenant: *Bell v. Horwood*, 3 T. R. 308. The payee of an accommodation-note may prove, in an action against the drawer, that he endorsed it to plt. for payment of goods before it was due; for, though liable for goods sold to the \*plt. if the action fail; if it succeed, he [\*945]

would be liable to the deft. for money paid: *Shuttleworth v. Stevens*, 1 Camp. 408. So, the acceptor of a bill may prove, for the endorsee against the drawer, that there were no effects of the drawer in the acceptor's hands: *Staples v. Okines*, 1 Esp. Rep. 331. And one of two joint drawers may, for the payee, in a separate action against the other drawer, prove his signature: *York v. Blott*, 5 M. & S. 71; 1 Str. 35. Where one partner drew a bill in the partnership name, and gave it to his separate creditor, in an action by that creditor against the acceptor, the deft. may call that or the other partner to prove the bill drawn without authority, and their bankruptcy would not vary the question of competency; for here, if the plt. fail, the partner who drew the bill would be liable to him for his former debt, and, if the deft. fail, liable to him upon the bill; and the other partner would, in this case, have his remedy against the drawer: *Ridley v. Taylor*, 13 East, 175. Deft. pleaded in abatement that the promises were made by him jointly with A. and B. A. was held competent to prove, for the plt., that the deft. was not authorized to make the contract, for though the plt. succeed, the deft. would not be estopped from suing the other partners for contribution; and, in such an action, as the record of the present may be used to prove the sum paid therein, the success of the plt. here must be rather prejudicial to the witness: *Hudson v. Robinson*, 4 M. & S. 476; *Cassham v. Goldney*, 2 Stark. 417: see *Taylor v. Cohen*, 12 Moo. 219. In a case where B. was called as a witness for the deft., in an action brought by the plt. for a barge which W. had placed in the hands of deft., and which it was alleged B. had sold to the plt. first, and then to W., B. was held a competent witness for the deft., having been released by W., *Radburn v. Morris*, 4 Bing. 649; and it would seem that he was competent, even without the release: *ib.*

A witness who stands in the same situation as the party for whom he gives evidence is not, on that account, disqualified; as, if two actions are brought against two for the same assault, in the action against the one, the other may be a witness, 1 T. R. 301; or, if several are indicted for perjury in swearing to the same fact: *R. v. Bray*, 2 S. N. P. 1120; 2 Hawk, P. C. 280; and see *Rudd's case*, 1 Leach, C. G. 151. So, for one who claims a right of common by prescription, in right of his estate, another who claims a similar right in right of his estate may be a witness: *Harvey v. Collison*, cited S. N. P. 439; 1 T. R. 302; B. N. P. 283. A vendor who sold the inheritance without a warranty, or covenant of title, may prove the title of the vendee: *Busby v. Greenslate*, 1 Str. 445. A vendor who received goods from the plt. as a security, and sold them on default of payment, may prove those facts for the vendee, the deft.: *Ward v. Wilkinson*, 4 B. & A. 410; *Nixon v. Cutting*, 4 Taunt. 18. The former proprietor of a horse, who sold him under warranty of soundness, is a competent witness to prove him sound: *Briggs v. Crick*, 1 Esp. Rep. 99. A dormant partner, not one of the contracting parties, who has had no privity of communication therein, may prove the contract: *Mawman v. Gillett*, 2 Taunt. 325, n. In an action by the vendee of a stolen horse, the original owner was admitted, to prove the theft: *Joseph v. Adkins*, 2 Stark. 80. In an action against an attorney for negligence in purchasing an annuity, the supposed grantor may prove it a forgery: *Hunter v. King*, 4 B. & A. 209. In an action for the mismanagement of a farm, the sub-lessor may prove its proper cultivation: *Wishart v. Barnes*, 1 Camp. 341. The tenant in possession may prove for the rever-

sion, the injury done to the inheritance by the deft.: *Doddington v. Hudson*, 1 Bing. 258. A creditor who has assigned his debt is competent to increase the fund out of which the debt is to be paid: *Heath v. Hall*, 4 Taunt. 326. In an action for falsely representing the circumstances of a third person, that person may prove himself insolvent: *Smith v. Harris*, 2 Stark. 47. A. lent B. a picture, who lent it to C.: in an action by B. against C., for injuring the picture, A. is competent for \*the [\*946] plt.: *Lethbridge v. Phillips*, 2 Stark. 544. In an action on an insurance, where the only question is concerning the original destination of the ship, the captain may prove that fact, though a part owner, and liable to the freighters, had the ship unnecessarily deviated; but, if the question turn on a deviation, he is incompetent: *De Symonds v. De La Cour*, 2 N. R. 374.

A witness is not incompetent because the verdict may come to the hearing of the jury, and so influence them in an action brought by himself, *R. v. Bray*, *Rep. temp. Hard.* 358, which case over-ruled *R. v. Whiting*, 1 Salk. 283, and *R. v. Nunez*, 2 Str. 1042, to the contrary. A. having brought an action against B., B. filed a bill in equity for an injunction, and A., for his answer thereto, being indicted for perjury, the indictment came on for trial immediately before the action, and B. was held a competent witness for the prosecution: *R. v. Boston*, 4 East, 572. So, the borrower upon usury seems a competent witness for the plt. in *qui-tam* against the lender, whether the loan has been repaid or not: see 1 Phil. Ev. 48; *Abrahams v. Bunn*, 4 Burr. 2251; *Smith v. Prager*, 7 T. R. 60; and see 2 T. R. 496; *Ridley v. Taylor*, 13 East, 175.

Liability to an action or information, in case the fact a witness is to prove be found otherwise, is no ground of incompetency. Thus, a person who has filled a corporate office may prove its usage, and what he did therein, though, if his acts be illegal, he would be liable to a *quo warranto*; *R. v. Bray*, *Rep. temp. Hard.* 358. And, although all the members present of a corporation are liable for its illegal acts, any may be witnesses to prove them: *ib.*; 2 S. N. P. 1120. A party in prison, on a charge of forgery of a bill, may prove it paid, in an action thereon: *Barber v. Gingell*, 3 Esp. Rep. 62. A wager laid by a witness, on the question in dispute, will not make him incompetent: *De Costa v. Jones*, *Cowp.* 736.

In an action against an administrator, one of his securities may prove a tender for him: *Carter v. Pearce*, 1 T. R. 163; see *Merish v. Foote*, 8 Taunt. 455. Trustees, and executors in trust, not making a beneficial interest, are competent for their *cestui-que trust*: *Gilb. Ev.* 120; *Baillie v. Wilson*, cited 4 Burr. 2254; *Goodtitle v. Welford*, 1 Doug. 140; 1 Mod. Rep. 107; 1 P. Wms. 287; 1 Bl. R. 366; *Rollison v. Bromley*, 12 East, 250; *Heath v. Hale*, 4 Taunt. 328; 6 Taunt. 220; 2 Marsh. 20; 1 Ball & B. 100, 414. A legatee who had received his legacy, is incompetent to increase the testator's estate: *Clarke v. Gannon*, R. & M. 31. A man who has been arrested is a good witness against the sheriff for the escape: *Cass v. Cameron*, *Pea. Rep.* 124.

Agents are competent for their principals: B. N. P. 289. A servant, by whom goods have been delivered, may prove the delivery, unless it appear to be customary to pay him for them: *Adams v. Davis*, 3 Esp. Rep. 48. So, a person who is to have a commission on the sale, to prove goods sold: *Murley v. Languish*, 1 C. & P. 216; *Dixon v. Cooper*, 3

Wils. 40. It seems doubtful whether, in an action for work and labour, the person who did the work is competent to prove that he, and not the plt., is the person not to be paid: *Martin v. Jackson*, 1 C. & P. 17. So, in trespass for breaking in a party wall, deft. pleaded a license, and plt. replied excess; the deft.'s workmen were competent to disprove the excess: *Cuthbert v. Gostling*, 3 Camp. 515. A servant sent to receive money may prove payment over to his master in favour of the person from whom it was received: *Matthews v. Haydon*, 2 Esp. Rep. 509. A captain of a ship may prove, against the owners, that the money lent to him was for the use of the ship, though the defence is that it was for the captain's own, *Evans v. Williams*, 7 T. R. 481, *n.*; or that it was, in fact, so applied, *Rocher v. Busher*, 1 Stark. 27; or, in an action against the owners, to prove the corn put on board was not safely carried: *Lay v. Hollock*, Pea. Rep. 101. A factor may prove a sale, though he is to have the extra amount over a certain sum, *Benjamin v. Porteous*, 2 H. Bl. 590; so, servants or carriers are competent to prove payment or receipt of money on delivery of goods: *Barker v. Macrae*, 3 Camp. 144; [\*947] *Green v. N. R. Comp.*, 4 T. R. 590; 2 Stark. \*Ev. 754. An apprentice may prove he paid money by mistake: *Martin v. Horrel*, 1 Str. 647. But agents are not competent concerning acts which are tortious, as in actions for their own negligence against their principal: *Green v. N. R. Comp.*, 4 T. R. 589. A servant who has embezzled and pawned his master's goods, is a good witness in trover against the pawnbroker: *B. N. P.* 290; *Greenway v. Fisher*, 1 C. & P. 190.

Informers entitled to part of the penalty are competent, where the statute can have no execution without their testimony, *Gilb. Ev.* 128; as by 2 G. 2, c. 24, s. 8, for bribery at elections, where the informer is competent: *Howard v. Shipley*, 4 East, 180; *Bush v. Ralling*, Say, 289. And it is no objection to the competency of a witness that an action is pending against him for bribery at the same election: *Howard v. Shipley*, 4 East, 180. Though the stat. 17 G. 2, c. 40, leaves an option to the judge to inflict either a fine or corporal punishment, the expectation of a share of the fine shall not render a witness incompetent: *R. v. Cole*, 1 Esp. Rep. 169, and see *R. v. Bland*, 5 T. R. 370.

Several statutes have made persons similarly interested competent witnesses. By the stat. 3 W. 3, c. 11, s. 12, those parishioners who receive nothing from the parochial collection are competent to prove money mispent by the churchwardens and overseers. The stat. 27 G. 3, c. 29, where penalties under £20 are given to the use of the poor for the benefit of the parish, or other place, makes the inhabitants competent: *R. v. Davis*, 6 T. R. 177. In actions against the hundred by the party robbed, the inhabitants of the hundred are made competent by 8 G. 2, c. 16, s. 15; and the party robbed may prove the robbery and amount, *B. N. P.* 187; the surveyor of the parish, in cases under the highway act, by stat. 13 G. 3, c. 78, s. 69, is competent; and, by 54 G. 3, c. 170, s. 9, so are the rated inhabitants, in any matter concerning the rates or boundaries of the parish, &c.

A witness who believes himself interested, but is not, seems competent: 1 Phil. Ev. 50, 52, *n.* (1.) So, also, a witness who considers himself under an obligation of honour to indemnify bail, but has not entered into that engagement: *Pederson v. Staffles*, 1 Camp. 145.

*Incompetency from Interest, how removed.]* The interest of a witness

may be divested before trial by payment or release, and his competency will then be restored. Thus, a release from the deft., drawer of a bill, to the acceptor, will render him competent: *Scott v. Lifford*, 1 Camp. 249. And, if the witness offer to release or surrender his interest, his competency is restored, though the other party refuse to accept the release: *Bent v. Baker*, 3 T. R. 35; *Goodtitle v. Welford*, 1 Doug. 139. Or, if the party on whose side the witness is interested, make an offer to remove his interest, and the witness refuse, that will not deprive the party of his testimony: 1 Phil. Ev. 128. A release of all interest removes an objection of next of kin, in an action by an administrator: *Ingram v. Dale*, 1 Phil. Ev. 124. But a member of a corporation is not a competent witness to sustain the claim of the corporation, even though he release his interest in the subject matter of the suit: *Doe v. Tooth*, 3 Younge & Jervis, 19. If a creditor of a bankrupt agree to release the estate, on an undertaking by one of the assignees to pay him what should appear to be justly due, he is competent, on the part of the assignees: *Sinclair v. Stevenson*, 1 C. & P. 582. If the witness has given a promissory note, jointly with others, as collateral security, to indemnify the deft., and his name be torn from the note, by consent of all parties thereto, he may be examined for the deft., without further release: *Sewell v. Stubbs*, 1 C. & P. 73. In an action, by several owners of a ship, for damage done to her, a release from one alone will render the master competent: *Hockless v. Mitchell*, 4 Esp. Rep. 86. In an action against the owner for damages done by the ship, a release from them to the pilot will render him competent, though hired and paid by the captain: *Aldridge v. Simmons*, 4 Camp. 392; 1 Stark. 214. But, on a policy, the captain is not admissible to prove the barratrous acts done by consent of the owners, without a release from the underwriters: \**Bird v. Thompson*, [\*948] 1 Esp. Rep. 339. A joint release of a joint liability to several persons, requires but one stamp: *R. v. Bayley*, 1 C. & P. 435; *Percy v. Bouchier*, 4 Camp. 80. If one of the bail be a material witness, application must be made to substitute another on the bail-piece: *Whatley v. Fearnley*, 1 Tidd's Prac. 259; 2 Chit. Rep. 103. So, if the evidence of one of the sureties in a replevin bond be necessary: *Bailey v. Bailey*, 7 Moo. 439; 1 Bing. 92. The assignee of a bankrupt brought an action, on the statute 9 Anne, c. 14, to recover money lost by the bankrupt at play; the bankrupt, though certificated, was held incompetent to prove the loss, but his competency was restored by three releases,—1st, by the bankrupt to the assignee; 2dly, by all the creditors to the bankrupt; 3dly, by the assignee, who was not a creditor, to the bankrupt: and, a year after the commission, all the creditors who had proved might be presumed to be all the creditors: *Carter v. Abbot*, 1 B. & C. 444, s. c.; 2 D. & R. 575. A legatee, who has been paid before trial, is a competent witness to increase the estate: *Clarke v. Gannon*, R. & M. 31. In such cases, the release must either be produced in court, or evidence given of its loss: *Larking v. Gerrard*, 1 Camp. 37. But a residuary legatee is not made competent for the executor, by releasing to him all claim to the debt, for, if the executor fail, he must pay the costs of his own attorney, which will be a charge upon the estate: *Baker v. Legewhitt*, 4 Camp. 27. In an action against a minor, a release by the guardian is insufficient: *Fraser v. Marsh*, 2 Stark. 41. So, where, notwithstanding a release and assignment of all interest, it appears that the witness was still liable for costs,

to the attorney employed to bring the action: *Bell v. Smith*, 7 D. & R. 846, s. c.; 5 B. & C. 183.

*Parties to suit, Incompetency.*] Parties to the suit cannot be witnesses for themselves, or their joint suitors: 1 Vern. 230; 1 P. Wma. 596; Gilb. Ev. 116; 1 Phil. Ev. 64. Not, though mere trustees, *Bauman v. Radenius*, 7 T. R. 668; or the *prochein ami* of an infant, *Cluttbuck v. Ld. Huntingtower*, 1 Str. 506; *James v. Hatfield*, 1 ib. 548; and see 2 ib. 1025; Gilb. Ev. 107. Nor if substantially a party to the suit, though not parties on the record: as, in an action against one of several partners, the deft. cannot call one of the other partners, nor render him competent by release: *Simons v. Smith*, R. & M. 29; but see *post*, 949. The governors of the poor under an act which enables them to assess rates, but makes them liable to costs on appeal, are not competent on the trial of such appeal: *R. v. St. Mary Magdalen, Bermondsey*, 3 East, 7.

*Parties, when Competent.*] Parties to the suit may, if willing, be called for the adverse party, *Norden v. Williamson*, 1 Taunt. 387, but cannot be compelled to give evidence: *Feron v. Granger*, 3 Camp. 178; 1 Phil. Ev. 67. Persons who are parties to a suit in a corporate capacity, and consequently not individually liable for costs, and who have no interest in the question, are competent: 1 Phil. Ev. 65. Thus, in an action against the governors of the Foundling Hospital for work and labour, Lord Kenyon admitted several governors for the defence: Pea. Rep. 153; and see 3 Atk. 401. And freemen have been admitted to establish the right of the corporation of London to tolls, 2 Lev. 231, 1 Vent. 254, 351, Gilb. Ev. 126, Pea. Ev. 174; but this has been doubted: B. N. P. 290; *Burton v. Hinde*, 5 T. R. 174. In an action for a malicious prosecution, the evidence given by the deft. on the prosecution is said to be admissible for him in the action: *Cabb v. Car*. B. N. P. 14; and see 6 Mod. 216. In an action on the stat. of Winton, 13 Ed. 1, c. 2, plt. is competent, "from necessity, on default of other proof," to prove the amount of his loss, 2 Roll. Ab. 686, B. N. P. 289, 1 Atk. 37, stat. 3 G. 2, c. 16, s. 15, but not other facts: Rep. temp. Hardw. 88. A person arbitrarily made deft., to prevent his testimony, may, if nothing be proved against him, be sworn as a witness for the other deft.: B. N. P. 283. But a deft., against whom nothing is proved, is not entitled, at the close of [\*949] the plt.'s case, as a matter of right, to be admitted for the co-deft.: *Emmet v. Butler*, 7 Taunt. 607. Nor has such a deft. a right to be acquitted, until all the other evidence for the defence is finished: by *Best, C. J.*, *Wright v. Paulin*, 1 R. & M. 128, see 1 Stark. 98. In a joint action against a justice and a constable, where the latter is completely justified by the warrant, he may be a witness for the former, after his whole case is finished: *Ward v. Bourne*, 2 Phil. Ev. 304. If one of several defts. plead his bankruptcy, and the rest the general issue, the former, though he has obtained his certificate, is not competent for the latter: *Raven v. Dunning*, 3 Esp. Rep. 25; *Bowie v. Child*, 3 Camp. 283; and see *Emmett v. Bradley*, 1 Moo. C. P. 332. But if a *nolle prosequi* has been entered as to him, he will be competent: 1 Moo. 339; 7 Taunt. 607; *McIver v. Humble*, 16 East, 171. Where one of several defts. in trover suffers judgment by default, he is competent upon the trial

for the co-defts., for he is not liable for their costs, if they be convicted, nor, if acquitted, is his own liability discharged: *Ward v. Haydon*, 2 Esp. Rep. 553; see *Marsh v. Smith*, 1 C. & P. 577. But he is not competent for the plt., against his co-deft.: *Chapman v. Graves*, 2 Camp. 333 (n.); *Mant v. Mainwarring*, 2 Moo. 13. Yet such deft. has been admitted to prove for plt., in ejectment, that the other deft. was in possession: *Doe v. Green*, 4 Esp. Rep. 198. A co-trespasser, not joined, may be sworn for the plt., though satisfaction from the deft. is discharge to him: B. N. P. 86; 2 Camp. 333; *Morris v. Daubigny*, 5 B. Moo. 319; but see *Lethbridge v. Phillips*, 2 Stark. 546; and 2 Stark. Ev. 764, (n). But, in assumpsit, if a deft. suffer judgment by default, he is neither competent to negative the contract for the other, *Brown v. Fox*, 1 Phil. Ev. 78, 8 Taunt. 141, nor to prove it for the plt.: *Brown v. Brown*, 4 Taunt. 752; and see 8 *ib.* 139. Nor is a witness, who is proved to be a partner with the deft., competent to prove himself alone liable, *Goodacre v. Breame*, Pea. Rep. 175, *Evans v. Yeatherd*, 2 Bing. 133; if released, he may: *Young v. Baine*, 1 Esp. Rep. 103; *Simons v. Smith*, R. & M. 29, *contra*; and see *Cheyne v. Hooper*, 4 Esp. Rep. 112. Yet, if a co-contractor be not joined, he is competent for the plt., *Blachett v. Weir*, 5 B. & C. 385; and to prove, his own joinder being pleaded in abatement, that the deft. contracted alone: *Hudson v. Robinson*, 4 M. & S. 475. If a witness for the plt. be made deft. by mistake, the court, on motion, will strike out his name: 1 Sid. 441; B. N. P. 285.

*Husband and Wife, Incompetency of.*] Neither the husband nor wife of a party to a suit can be called to give evidence upon either side: Co. Lit. 6, (b.); Gilb. Ev. 119; 1 Phil. Ev. 71: *Bentley v. Cooke*, cited in 2 T. R. 265; Sir T. Raym. 1; 2 Hale P. C. 301; 2 Ld. Raym. 752. So if, though not a party to the suit be brought for the benefit of either: *Davis v. Dinwoody*, 4 T. R. 678. But that they are not competent to give any evidence in collateral cases which has a tendency to criminate each other, the doctrine ruled in *Rex v. Cliviger*, 2 T. R. 265, has been questioned and restricted in the case of *Rex v. Inhabitants of All Saints, Worcester*, 1 Phil. Ev. 74. And, in an action between third persons, if the evidence of the wife merely tend to expose her husband to a legal demand, she is not incompetent: *Williams v. Johnson*, 1 Str. 504; *Tiley v. Cowling*, Ld. Raym. 744; *contra, ante*, 54, 571-4. The widow of the testator is competent for the plt. against the executors: *Beveridge v. Minter*, 1 C. & P. 364. But a widow cannot be asked to disclose a conversation between herself and her late husband, *Daken v. Hasler*, 1 R. & R. 198; nor a woman divorced *a vinculo matrimonii*: 6 East, 192. The wife is not permitted to give evidence, though the husband consent: Rep. Temp. Hard. 264. A woman who had cohabited with one indicted for forgery, whom also he represented on the trial to be his wife, but because that objection was taken to her competency, denied to have ever been married, has been held incompetent by *Ld. Kenyon*; and the question is considered doubtful: *Campbell v. Tremlow*, 1 Price, 81, 83. A \*bankrupt's wife may be examined before the commissioners, [\*950] by stat. 21, J. 1, c. 19, s. 5. In appeal against an order of bastardy, she may prove an adulterous intercourse, Rep. temp. Hard. 82, *Rex v. Luffe*, 8 East, 203; but not want of access: 11 East, 152; 1 Wils. 340. For declarations of husband and wife, see "*Admissions*," 54. A kept

mistress is not incompetent to give evidence for her protector, although she has passed by his name, and has appeared in the world as his wife, *Batthews v. Galindo*; but, in a case where a criminal called his alleged wife to prove a fact, and, upon being told that his wife could not give evidence, denied that she was his wife, *Ld. Kenyon*, rejected her testimony: cited by *Richards, C. B.*; in *Campbell v. Tremlow*, 1 Price, 81. And where, in that case, an arbitrator had rejected the testimony of a woman who had been held out as the wife of a party, it was considered, that she was rightly rejected; and, where a woman entered her alleged husband's name, with a note in the margin, "married?" she was concluded, *Mace v. Cadell*, Cowp. 233, from denying that fact, and afterwards giving evidence.

*Attorneys, Competency of.*] Confidential communications to the attorney in the cause of his client are privileged, and cannot be revealed, either in that or any cause, *Wilson v. Ratsall*, 4 T. R. 753, though the proceedings to which they relate be at an end; and this is the privilege of the client and not of the attorney: *ib.* Therefore, in an action by the assignees of a bankrupt, communications made by the bankrupt to his attorney may be given in evidence to prove the act of bankruptcy, if the bankrupt consents: *Merle v. Moore*, 2 C. & P. 275. Nor is an attorney at liberty to disclose evidence which has been confidentially communicated to him by his client, though his client is not a party to the cause before the court: *Rex v. Withers*, 2 Camp. 578. And communications made by a party to an attorney are confidential, although they do not relate to a cause existing or in progress at the time they were made: *Cromack v. Heathcote*, 4 Moo. 357; 2 B. & B. 4. The privilege of not being examined as to the facts communicated to an attorney, extends only to those communications which relate to the purposes of either bringing or defending an action or suit existing at the time of the communication, or then about to be commenced: *Williams v. Mundie*, R. & M. 34. A solicitor under a commission of bankrupt is not bound to produce the proceedings under the commission, in a collateral action, where the proceedings might tend to the detriment of his clients: *Laing v. Barclay*, 3 Stark. 42. And where, on an issue as to the liability of the debts, as partners, an attorney, subpœnaed to produce a composition-deed, executed between them and another firm, showing the partnership, may object to the production of the instrument, on the ground that the disclosure of its contents may prejudice the latter in disputes with other persons: *Harris v. Hill*, 1 D. & R. N. P. C. 17. The rule, as to privileged communications, extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself: *Taylor v. Foster*, 2 C. & P. 195; 2 D. & R. 347. The agent of the attorney is also privileged: *Parkins v. Hawkshaw*, 2 Stark. 239. And an interpreter who is present at conversations between a foreigner and his attorney, is equally bound to secrecy as the attorney himself: *Du Barre v. Livette*, Pea. Rep. 77.

When competent, an attorney is not restrained from giving evidence of a conversation between him and his client, touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon: for the purpose of the suit having been answered, the communication could not be said to have been made by way of instruction for conducting the cause: *Cobden v. Kendrick*, 4 T. R. 431. Nor



are communications made by a client to his attorney not in the character of an attorney: as, where they are not for the purpose of asking his legal advice, but to obtain information as to the matter of fact, which might have been made by any other person as well as an attorney, they are not privileged,\* and may be disclosed by the attorney: [\*951] *Bramwell v. Lucas*, 2 B. & P. 745; 4 D. & C. 367. And an attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness, in the character of his attorney: *Spencer v. Schulenburg*, 7 East, 357, s. c.; 3 Smith, 325. And an attorney is not privileged from giving evidence of collateral facts; therefore, he may be obliged to prove that his client swore to and signed an answer, upon which the latter is indicted for perjury: *Doe d. Jupp v. Andrews*, Cowp. 845. Thus, a knowledge of a client's hand writing, obtained by his attorney from having witnessed his execution of a bail-bond, is not a confidential knowledge, so as to privilege the attorney from answering, when called on the part of the plt. to prove the deft.'s hand writing on the trial: *Hurd v. Thoring*, 1 C. & P. 372. The plt. may call the former attorney of the deft. to prove an offer by him on the part of his client to settle the account, and to pay a sum of money as due to the plt.: *Turner v. Railton*, 2 Esp. Rep. 474. And an attorney, who prepares deeds which are granted on a usurious consideration, is a competent witness to prove the usury, *Duffin v. Smith*, Pea. Rep. 108; and he may disclose facts which he might have known without being intrusted as an attorney in the cause: B. N. P. 284.

But where an attorney has come to the knowledge of a deed, &c. having been destroyed, from the circumstance of his having been employed as an attorney, he cannot be examined as to the fact, the knowledge of which was so obtained: *Robson v. Kemp*, 5 Esp. Rep. 58. A person who is by profession an attorney, if not employed in the particular business which is the subject of inquiry, is a competent witness, although he may have been confidentially consulted: *Wilson v. Rastul*, 4 T. R. 753. A letter written by an attorney to his client, and produced with the client's signature endorsed on it, is evidence against the client: *Mayer v. Seflon*, 2 Stark. 275. An attorney may be examined as to facts which he knew before his retainer, 1 Vent. 197; but he cannot be permitted to allege that his client told him, before an action brought, that he intended to waive a forfeiture on which he supports his action: *Goodlight v. Budge*, Loft, 27. A person to whom a party, supposing him to be an attorney, makes confidential communications respecting his cause, is not privileged, but is bound to give evidence of them: *Fountain v. Young*, 6 Esp. Rep. 113.

• *Counsel, Arbitrators, &c. Competency of.* Counsel, when acting in that character, cannot be called as witnesses, and are excluded on the same ground as attorneys; therefore, a barrister cannot be examined as a witness to prove what was stated by him on a motion before the court: *Curry v. Walter*, 1 Esp. Rep. 456. And a party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk or otherwise, as the retaining of counsel falls within the rule respecting confidential communications: *Footo v. Hayne*, 2 C. & P. 545.

An arbitrator will not be allowed to depose as to what transpired before him, either upon the examination of the parties themselves, or on an inspection of their books, upon the principal that the parties themselves could not have been examined in the former cause. Therefore, where a cause has been referred, and the arbitrator, upon inspection of plt.'s books and examination of the parties, finds that the plt. had no cause of action, in an action for a malicious prosecution, the arbitrator cannot be examined, to prove those facts: *Habersham v. Torby*, 3 Esp. Rep. 38. But an arbitrator may be called to prove what matters were claimed before him on a reference: *Martin v. Thornton*, 4 Esp. Rep. 181.

*Public Officers and others.*] By the operation of the same [\*952] rule these \*persons are privileged; as the official communications between the governor and law officer of a colony, *Wyatt v. Gore*, Holt, 299; orders given by a governor of a colony to a military officer, 2 Stark. 183; a correspondence between an agent of government and a secretary of state, *Anderson v. Sir W. Hamilton*, 2 B. & B. 136, n., and the report of a military court of inquiry, *Horne v. Ld. T. Bentick*, *ib.*, 130.

### *Examination of Witnesses.*

On the examination in chief, leading questions, or such questions as suggest to the witness the answer to be made, and where the answer yes or no would be conclusive, are inadmissible; but questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the cause, may be asked; and, when necessary, it is allowable, to some extent, to direct the witnesses' attention to the subject of inquiry: *Nicholas v. Dowding*, 1 Stark. 81, 2 *ib.* 128. Thus, where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as if he is called to contradict another as to the contents of a particular letter which is lost, and cannot, without suggestion, recollect the contents, the particular passage may be suggested to him: *Courteen v. Touse*, 1 Camp. 43. And where a witness is called to prove a co-partnership, between several persons whose names he does not remember, the list of names may be read to him, and he may be asked whether those persons are members of the firm: *Acerro v. Petroni*, 1 Stark. 100; 1 Stark. Ev. 127. And, if a witness, on his examination in chief, shows himself decidedly adverse to the party calling him, it is in the direction of the Judge to allow the examination to assume the form of a cross-examination; and, also, if the witness stands in a situation which of necessity makes him adverse to the party calling him, the counsel may, as a matter of right, cross-examine him: *per Best, C. J., Clarke v. Saffery*, R. & M. 126.

As to actual knowledge, a witness stating facts can only state those of which he has a personal knowledge, and cannot be examined as to his belief or persuasion, *Acerro v. Petroni*; where, however, a witness deposes as to matters of skill and judgment, or matters wherein his knowledge is derived from general information, the opinions of experienced persons, in this rule, is rendered admissible; as where professional men

and others give evidence, formed from their professional experience and skill.

*Cross Examination.*] In cross-examination greater latitude is allowed in the manner of putting questions, and a witness may be so led as to bring him directly on the point as to the answer; but not to go the length of putting into the witness' mouth the very words he is to answer, *per Eyre, C. J.*, 24 St. Tr. Ph. 284; nor must the questions put assume facts to have been proved, or that particular answers have been given contrary to the fact. It is not allowable to ask irrelevant questions, but, if answered, they cannot be contradicted: *Harris v. Tippet*, 2 Camp. 637; *Spenceley v. Willot*, 7 East, 109; 2 Stark. 157. As to what are relevant or irrelevant questions, they must depend upon the issue on record.

If a witness is called by a party merely for the purpose of producing a written instrument belonging to the party, which is to be produced by another witness, he need not be sworn, and unless sworn, he is not subject to cross-examination, 1 Phil. Ev. 260, *R. v. Brooke*, 2 Stark. 473; but, if sworn, he may be cross-examined, though no question has been asked him in chief: *ib.*, 1 Esp. Rep. 357. A witness cannot be cross-examined as to what he swore in an affidavit, unless the affidavit be produced: *Sainthill v. Bound*, 4 Esp. Rep. 74. What is opened by the counsel of one party \*as presumptive evidence in favour of his [\*953] client against the other, cannot be examined into, on cross-examination of his witness, if they have not been examined in chief, as to the facts so stated in his favour: *Lucas v. Novosilieski*, 1 Esp. Rep. 297. Thus, an engineer may be examined as to his judgment on the effect of an embankment in a harbour, as collected from experiment: *Folkes v. Chad*, cited 4 T. R. 498. So, the testimony of medical men is constantly admitted with respect to the cause of disease; and witnesses may also be asked as to their opinion of the identity of parties, or their handwritings, &c.; *ante*, 553. And it has been ruled at *nisi prius*, that, if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause, so that the other party may call the same witness to prove his case, and in examining him, may ask leading questions: 1 Phil. Ev. 260; *Dickerson v. Shee*, 4 Esp. Rep. 67. A witness cannot be asked, on his cross-examination, whether he has written such a thing, but the paper should be put into his hands, and he should be asked whether it is his writing, *Queen's case*, 2 B. & B. 293; if, in such a case, he admits it to be his writing, he cannot be asked whether certain statements are in it, but the whole letter must be read: *ib.*, 288. According to the ordinary rule, the letter is read as the evidence of the cross-examining counsel, as part of his evidence after he shall have opened his case; but, if he suggests to the court that he wishes to have the letter read immediately, in order that he may found certain questions on the contents of it, it will be read as part of the evidence of the counsel proposing it: *ib.*, 290; 3 Stark. Ev. 1742, 1750. ●

*Re-examination.*] It must be confined to the subject-matter of cross-examination. Where a witness in support of a prosecution has been examined as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution,

it is not competent to the accused to examine witnesses in his defence to prove such declaration or acts, without first calling back such witnesses examined in chief, to be examined as to the fact whether he ever made such declaration or did such acts; *Queen's case*, 2 B. & B. 311. In civil cases, the Judge will allow the plt.'s counsel, after he has closed his case, to recall a witness to prove a point omitted to be proved in the first instance: thus, in trespass, *quare clausum fregit*, the plt.'s counsel, after he has closed his case, may recall a witness to prove that the *locus in quo* was in the possession of the plt., which he had omitted to do on his previous examination: *Brown v. Giles*, 1 C. & P. 118. In an action for seduction, it has been ruled, that the plt.'s counsel may call witnesses to prove the general good character of the party seduced, if such character has been attacked in cross-examination: *Bate v. Hill*, 1 C. & P. 100; *contra*, *Dodd v. Norris*, 3 Camp. 519. If a witness called by the plt. has been examined and cross-examined, and has quitted, and the deft. has afterwards occasion to call the same witness back to prove his case, the counsel for the deft. is not bound to examine in chief, but may put leading questions, as in cross-examination: *Dickinson v. Shee*, 4 Esp. Rep. 67.

*Separate Examination.*] When it is desirable that the witnesses should be examined separately, out of the hearing of each other, to prevent them from hearing the testimony of each other, the court will order the witnesses to withdraw, and if any witness, after the order, remain in court, he cannot be examined, *Att. Gen. v. Bulpit*, 9 Price, 4; but, when the witnesses in the cause are ordered out, the attorney may remain and be afterwards called as a witness: *Pomeroy v. Baddeley*, R. & M. 430.

*Credit of Witness, how impeached and Supported.*] The party against whom a witness is called, may disprove the facts stated by him, or may examine other witnesses as to his general character; and a letter [\*954] \*written by a witness may be given in evidence, to contradict the testimony given by him on the trial: *De Sailly v. Morgan*, 2 Esp. Rep. 691. But, to lay a foundation for the evidence of his having made contradictory statements, witness must be asked, on cross-examination, if he has made such statement: *Queen's case*, 2 B. & B. 301. Where a witness contradicted himself in the course of his examination, and swore both affirmatively and negatively, and it was doubtful whether the witness was, from some undue motive, grossly prevaricating in his answers, or whether he was so ignorant and vacillating, that his knowledge, or even opinion, of a particular fact in question, could not be relied on, *Abbott, C. J.*, refused to stop the cause, as he thought it was for the jury to decide upon the credit due to such a witness; *Beauchamp v. Cash*, D. & R. N. P. C. 3. The jury, however, cannot give credit to a part of the testimony of a single witness, where it is neither supported nor contradicted by any other witness, and reject other parts of his testimony equally uncontradicted or unsupported: *Mudge v. Fear*, 1 Smith, 409; see 1 Phil. Ev. 276 to 291.

Although a party cannot call evidence directly to discredit his own witness, yet if the witness unsuspectingly state facts against the interest of the party calling him, other witnesses may be called by the same party to disprove those facts, B. N. P. 297; and, if the first witness disprove the

fact relied on, the party is not thereby precluded, but may call other witnesses to establish such facts: *Ewer v. Ambrose*, 3 B. & C. 746; 5 D. & C. 629; 4 B. & R. 25; 6 D. & R. 127. Where the endorsee of a bill, in an action against the acceptor, called a witness to prove the endorsement, who deposed, the plt. was afterwards allowed to call the endorsee himself to prove his own endorsement: *Richardson v. Allan*, 2 Stark. 334. And, if a witness unexpectedly gives evidence against the party calling him, although his evidence cannot be in any part relied on, and the rest of it is disproved, it may be entirely repudiated, and witnesses may be called on the same side to contradict him: *Alexander v. Gibson*, 2 Camp. 556.

*What Questions Witness need not answer.*] The law will not compel a witness to answer a question, where the answer would subject him to penal consequences; and a witness may object to answer a question which he thinks will tend to his crimination, though the answer would not lead to an immediate conclusion of his guilt: *Cates v. Hardware*, 3 Taunt. 424. But a witness cannot refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any kind, on the ground that the answering of such question may establish that he owes a debt, or is subject to a civil suit: 46 G. 3, c. 37. How far a witness may be examined as to questions tending to disgrace or degrade, may, in some measure, depend on circumstances: 4 Esp. Rep. 243; *Rex v. Lewis*, *ib.* 225. In an action for seducing plt.'s daughter, *per quod servitium amisit*, she is not bound to answer, in cross-examination, whether she had not been previously criminal with other men: *Dodd v. Norris*, 3 Camp. 519; see cases collected, 1 Phil. Ev. 269. If a witness, being cautioned that he is not compellable to answer a question that may criminate him, still chooses to answer it, he is bound to answer all questions relative to the transaction, and cannot afterwards take an objection to any further question that has a tendency to criminate him: *Dixon v. Vale*, 1 C. & P. 278. Where a witness declines to answer a question, no inference of the truth of the fact inquired into may be drawn from that circumstance: *Rose v. Blake-more*, R. & M. 383.

*Memorandum to refresh Witness' Memory.*] A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but, if he cannot swear to the fact from his own recollection, any further than as finding it entered in a book \*or paper, the original book or paper must be produced: *Doe d.* [\*955] *Church v. Perkins*, 3 T. R. 749; 8 East, 273. And a witness, on his examination, may refresh his memory from a document, although not written by himself, *Henry v. Lee*, 2 Chit. Rep. 124, if he examined it from time to time while the events are fresh in his memory: *Burrough v. Martin*, 2 Camp. 112. But a witness will not be allowed to refresh his memory from a copy of a paper made by himself six months after he made the original, although the original is proved to be so covered with figures that it is unintelligible: the original paper having been written near the time of the transaction: *Jones v. Stroud*, 2 C. & P. 196. Where a paper is put into the hands of a witness to refresh his memory, the counsel on the opposite side have a right to see it, unless it is merely given to him to prove

a handwriting to it, in which case they have not: *Sinclair v. Stevenson*, 1 C. & P. 582. To prove an act of bankruptcy committed some years back, an old witness may be allowed to recur to his depositions made at the time, to refresh his memory, and thereby ascertain the date of such act of bankruptcy: *Vaughan v. Martin*, 1 Esp. Rep. 440. Where the plt. entered an account in writing of goods and cash furnished to the deft. from time to time, each page of which was authenticated by the deft.'s acknowledgment in writing of the receipt of the contents, though such acknowledgment in writing cannot be given in evidence, *per se*, in respect of the cash items, amounting to 40s. in each page, for want of the receipt-stamp, yet it is competent to the plt. to prove that, upon calling over each article to the deft. he admitted he had received the same; and the witness may refresh his memory by referring to the account: *Jacob v. Lindsay*, 1 East, 460.

### *Compelling Attendance of Witnesses.*

A copy of the subpoena should be served on each witness personally, a reasonable time before the day of the trial, 2 Str. 1054, 1 *ib.* 510; and notice in London at two in the afternoon, for a witness to attend the sittings at Westminster that evening, has been held to be too short: *ib.* 5 Esp. Rep. 46. If the witness live within the bills of mortality, it is usual to leave a shilling with the copy of the subpoena; but, if he live at a greater distance, he is not obliged to attend, unless his reasonable expenses are paid, or tendered to him, not only for going to, but also for returning from the trial, Tidd. 856; and, if he attend, he may refuse to be sworn, and may still maintain an action for his expenses: *Hallett v. Mears*, 13 East, 15. A witness, attending a trial under a subpoena, is not, however, entitled to a compensation for his loss of time, although the party requiring his attendance expressly promises to pay him for such loss, *Willis v. Peckham*, 1 B. & B. 515, 4 Moo. 300, unless in the case of medical men and attorneys: *ib.*: *Moor v. Adam*, 5 M. & S. 156. And compensation for loss of time has been disallowed to merchants who came from abroad, *ib.*; and, if they are domiciled in this country, they are not entitled to expenses for returning home: *Lopes v. De Tastet*, 7 Moo. 120.

A witness is privileged from arrest, *cundo, morando, et redeundo*: *Ricketts v. Gurney*, 7 Price, 699. This protection does not, however, extend to a person absconding from his bail, as it will not be considered an arrest, but a mere retaking, *Horn v. Swinford*, 1 D. & R. 20; nor to a witness taken by his bail to be surrendered: *ex parte Lyne*, 3 Stark. 132.

FORM OF REMEDY AND PLEADINGS, 956.

PRECEDENTS, 957.

EVIDENCE FOR PLAINTIFF, *ib.*—*Proof of Contract, ib.*—*Of Performance of Work, &c.*, 959.—*Price recoverable*, 961.

EVIDENCE FOR DEFENDANT, *ib.*—*What Defence he may set up, ib.*

### *Form of Remedy and Pleadings.*

THE form of remedy for the recovery of a demand for work and labour is by action of assumpsit or debt, if the contract for it be not under seal, or, if under seal, then by action of covenant or debt on the deed.

With respect to the form of the declaration, if the money be claimed as due under a deed, see, *ante*, "*Covenant*," "*Debt*." If the claim be on a contract not under seal, and the work and labour has been actually performed, and the contract was to pay in money, and the time for payment of it has expired, the same may be recovered under the common count for work and labour, and plt. need not declare specially: Fitzg. 302: 1 Wils. 117; B. N. P. 139; Holt, C. N. P. 237. And, in general, where there is a special contract, but additional work has been done, not included in such contract, the price of such additional work, &c., may be recovered under the common count, although, from the stipulations of the special contract as to credit, &c., the price of the work done under the special contract cannot be recovered: *Robson v. Godfrey*, Holt, C. N. P. 236; 1 Stark, 275, *s. c.* An *indebitatus* count by a factor, on a *del credere* commission, has been held good after verdict, *ante*, 59, 1 Chit. Pl. 303; and this however special the contract was: *ib.* And, in a late case, where the defts. had executed a charter-party, under which the cargo was to be sent alongside the ship at the merchant's expense, the captain rendering the usual and customary assistance with his boats and crew, and some of the cargo being about thirty yards from the edge of the wharf, the captain applied to deft.'s factor for labourers to remove it into boats, and the factor refused, saying, he would abide by the charter-party, and the captain hired labourers for the purpose, it was held, that the expense, &c., so incurred might, notwithstanding the charter-party, be recovered under the count for work and labour, or money paid: *Fletcher v. Gillespie*, 2 Bing. 635. Extra freight is recoverable under this count: Holt, C. N. P. 392; 1 Stark, 275. If the claim be not strictly for work and labour done, the declaration must be special, 2 Marsh. 273; and so, if the contract has not been performed by the plt., although the deft. prevented its performance, 2 East, 145, 1 H. Bl. 287, 4 East, 147: *sed quære*, if deft. has prevented it: see 5 B. & C. 638; 2 D. & R. 347. If the contract was not to pay in money, the declaration must be special, see *ante*, 534; so, where the contract is conditional, or in the alternative, *ib.*; or where the whole credit has not expired: *ib.* Where the work and labour were for a third person, at deft.'s request, it may, nevertheless, be stated to be for the deft., *ib.*; but a collateral undertaking, within the Statute of Frauds, must be declared on specially: *ante*, "*Guarantee*." If there has been a contract, giving stipulated damages

for a breach of it, to recover such damages, the declaration must be special: *ante*, 154, 902. Where there is an entire contract for work and labour and materials, the latter cannot be recovered under the common count for goods sold: 6 Taunt. 322; 1 Marsh, 581, *s. c.* The proper mode is to insert in the common work and labour count the claim for the materials, [\*957] and under the usual averment, in this respect, the \*plt. may recover for attendances as a farrier and for medicines, &c.: 3 Camp. 37. Where the claim is for fees, wages, or work and labour, in particular professions or business, &c., it is common to insert a count, stating the same particular, as in actions by attorneys for the fees, or agents for commission, &c.; this, however, is not absolutely necessary, and the common count for work and labour would in all such cases suffice: 3 Camp. 37; 1 N. R. 269; 2 Saund. 350; *n.* 2; 1 Chit. Pl. 304.

In assumpsit or debt on simple contract, the plea of the general issue will mostly suffice; as to when not, see *ante*, 138, 406.

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### *Precedents.*

#### INDEBITATUS COUNT FOR WORK, LABOUR, AND MATERIALS.

(*The commencement of the count in assumpsit is as ante*, 139; *in debt*, *as ante*, 408; *and then proceed as follows*.) As well for work and labour, care and diligence, before that time done, performed, and bestowed, by the said plt., by him and his servants, for the said debt, and at his instance and request, as for divers materials and necessary things before that time found and provided by the said plt. for the said debt, and at his like instance and request, and used and applied in and about the said work and labour. And being so indebted, &c. (*Conclude the account in assumpsit as ante*, 139, *in debt*, *as ante*, 409. *The commencement of the quantum meruit in assumpsit is as ante*, 139, *in debt*, *as ante*, 409; *and proceed as follows*.) Had before that time done, performed, and bestowed, by him and his servants, other work and labour, care and diligence, for the said debt, and at his like instance and request, and had found and provided for the said debt, and at his like instance and request, divers other materials and necessary things, used and applied in and about the said work and labour last mentioned, he, the said debt. undertook, &c. (*Conclude as ante*, 139, *in assumpsit*, *and as ante*, 409, *in debt*.)

See other precedents for work and labour, as agents, *ante*, 60; as attorneys, *ante*, 156.

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### *Evidence for Plaintiff.*

The plt. must, under a special declaration, be prepared to prove all the material facts averred therein. Under the common count for work and labour, he must be prepared to prove the debt's contract, the work and labour done, and the price of it.

*Proof of Defendant's Contract.*] Where there has been an express contract in writing, such writing must be produced, properly stamped, and the debt's handwriting thereto proved. As to what is an agreement for work and labour, not exempt from the stamp law, see *ante*, 816. As to proof of handwriting, *ante*, "*Handwriting*." As to secondary evidence, of the agreement, *ante*, "*Secondary Evidence*." Where the contract



must be in writing, *ante*, 547. If the agreement was by parol, or implied, it must be proved by witnesses present when it was made, or at another time, when the circumstances creating the deft.'s implied liability took place.

A contract by deft. to pay for work, &c. may frequently be implied, as where he acquiesces in the work, which is carrying on upon his own premises, or where he voluntarily avails himself of the benefits of the plt.'s work, &c.; and such facts, when they have taken place, should be proved. In an action by an attorney, for his fees, proof that the father of the deft. employed the plt. to defend the suit, and that the deft. knew of such retainer, and did not disapprove of it, was held sufficient to render him liable: *Cameron v. Baker*, 1 C. & P. 268: and see *ib.* 157-8. We have already seen instances of the overseers of the poor being liable for the attendance,\* &c. of a surgeon on a pauper, although they [\*958] never actually gave orders, *ante*, 88; as to the liability of vestrymen, *ante*, 74, 708. A master of a ship contracts by bill of lading, with the shippers to deliver goods to their assigns, he or they paying freight for the same: if the purchaser of the goods takes them, this is evidence of a new agreement by him, as the ultimate appointee of the shippers, for the purpose of delivery, to pay the freight due for the carriage: *Cook v. Taylor*, 13 East, 399; 3 Bing. 383; *ante*, 530-1. Where a person illegally avails himself of the labour of another's servant, the latter may waive the tort, and sue for the services, as where he harbours and employs the apprentice of another, after his desertion: 3 M. & S. 191; *ante*, 92, 111.

There must be some privity of contract between the plt. and deft.; therefore, where A., employed by the deft. to transport goods to a foreign market, delegated the entire employment to the plt., who performed it without the privity of the deft., it was held that the plt. could not recover from the deft., a compensation of such service: *Schnaling v. Thomlinson*, 6 Taunt. 147, *s. c.*; 1 Marsh. 500; and see *Cull v. Backhouse*, 6 Taunt. 148, *n.*; and *Guy v. Gore*, 2 Marsh. 273. So, where one was elected and nominated to serve in parliament, but neither proposed himself as a candidate, nor in any way interfered in the election, he was held not liable for the expenses of the hustings, although he afterwards took his seat in parliament: *Morris v. Burdett*, 2 M. & S. 212. Where an act of parliament for rebuilding a bridge empowered justices of the peace to contract for its erection, and also directed that all actions, &c. to be prosecuted or defended, in pursuance of the act, should be brought by and against the clerk of the peace, and the justices of sessions covenanted with the builder, that the justices or treasurer of the county would pay him specified sums by instalments, it was held that the parties were not individually liable, and that the remedy was by action against the clerk of the peace: 2 Moo. 621; 1 T. R. 172, 674. As to the liability of vestrymen, *ante*, 74, 708; overseers, *ante*, 88. The registered owner of a ship is not liable for repairs, unless actually done on his credit. Legal ownership is indeed *prima facie* evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship: R. & M. 49, 119, 302; 2 Bing. 179. If the credit was not given to the deft., he is not liable: *ante*, "Guarantee," 547. The question as to when the credit was given is for a jury; see 2 B. & C. 11; 3 D. & R. 195, *s. c.* As to when an attorney should sue the attorney who employed him, or party employing that

attorney, see *ib.*, *ante*, 158. If credit has been given to one person, it cannot be shifted to another: 1 C. & P. 16. But an executor who has assets sufficient for the purpose, is liable, upon an implied promise, to pay for a funeral, suitable to the degree of his testator, furnished by the direction of a third person: *Rogers v. Price*, 9 Younge & Jervis, 28.

To entitle the plt. to recover, he must prove the contract to have been such as to entitle him to a compensation for his services. A request to a tradesman to show deft.'s house, and deft. would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the work and labour bestowed in the service: *Jewry v. Busk*, 5 Taunt. 302. On the other hand, it has been held that an action cannot be maintained for services performed with a view to a legacy; and not in expectation of a reward in the nature of a debt: *Stra.* 728; 1 Esp. Rep. 188. See instances *ante*, 163, as to when an attorney undertakes a case gratuitously. And, where a person had performed a work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right," it was held, that an action would not lie to recover a recompense for such work, as the resolution only imported that the committee were to judge whether any remuneration was due, and it was entirely at their discretion to remunerate or not: *Taylor v. Brewer*, 1 M. & S. 290. A foreign consul, resident in this country, and receiving a salary for acting as an officer from his own government, cannot

[\*959] maintain "an action for any trouble he may have been put to in transacting business for merchants here, in which he acted in conformity to the express instructions of his own government: *De Lem v. Haldimand*, 1 R. & M. 45. A servant who comes over from the West Indies, where he has been a slave, and who continues in the service of his master in England, without any agreement for wages, is not entitled to any wages, unless there has been an express promise on the part of his master, for there was no original contract to pay: 3 Esp. Rep. 3; and see 2 C. & P. 231. If there be a prior or subsequent express promise to pay an arbitrator for his trouble, it is clear he may sue for it, *Stykes*, 465; but it seems he cannot sue for a remuneration in the absence of an express promise: *Birany v. Warne*, 4 Esp. Rep. 47; *sed vide*, 1 Gow, 7, 8; 1 Taunt. 461; 5 *ib.* 342. A proctor or certificated conveyancer, may sue for fees, 9 B. & C. 744, 5 D. & R. 648, *s. c.*; so may a messenger under a commission, 2 C. & P. 123, 2 M. & S. 438; or a commissioner, to examine witnesses, *Carth.* 208, *Comb.* 186; and as to sheriffs, see *Chit. Contr.* 173. But barrister, 3 Bl. C. 28, 2 Atk. 332, *Pea. Rep.* 96, or physician, or medical practitioner, affecting to be a physician, cannot, 4 T. R. 317, 2 Camp. 441; nor can a witness sue for remuneration for his loss of time: 1 B. & B. 515; 5 M. & S. 156.

*Proof of Work and Labour done.*] We have already partially considered as to how far the performance of the work is a condition precedent to the payment of the price of it: *ante*, 122 to 127. The plt. must prove, in general, the work done according to the contract, or, if not done according to the contract, he must prove that it was done, and that deft. has adopted the work, &c., and derived some benefit from it.

An entire contract cannot be apportioned; therefore, whenever an entire sum is to be paid for an entire work, the entire performance of such work

is, in general, a condition precedent, and must be established before debt. can be called on for the payment of such sum, see 6 T. R. 326, 7 T. R. 484, 2 East, 145; and this, though the completion was prevented by accident, as by death, fire, &c.: *ib. post*; 960. But, if the debt. disaffirm the entirety of the contract, what in law amounts to a partial benefit, the plt. may recover *pro tanto*. Where the employer engaged, in writing, to pay a sailor the sum of thirty guineas, provided he proceeded, and continued, and did his duty on board, for the voyage, and, before the end of the voyage, the sailor died, it was held that the contract was entire, and that, as the service, which was a condition precedent, had not been performed, nothing could be recovered: *Cutter v. Powell*, 6 T. R. 326. So, where a sailor contracted to serve on a voyage from Altona to London, and back again, but it was stipulated that he should not be entitled to his wages till the end of the voyage, and, upon the arrival of the ship in London the captain dismissed the plt., but in a few days afterwards required him to go on board again, which he refused to do, the court held he was not entitled to recover *pro rata*, on the ground that the contract had not been rescinded by the debt., but still remained open: *Hull v. Heightman*, 2 East, 145. Where the debt.'s testator had appointed the plt. to receive his rents, and promised to pay £100 a year for the service, and the testator died after the plt. had served him for three quarters of a year, the contract, being entire, could not be divided, and plt. could not recover any thing: *Countess of Plymouth v. Throgmorton*, 2 Salk. 65. A servant in husbandry cannot sue unless he completes the year's service, 6 T. R. 467; and, if he refuse to perform the service by disobeying the reasonable orders of his master, and the master dismiss him, he cannot recover any thing: *Spain v. Arnott*, 2 Stark. 256. And, if a common menial servant depart, without giving the usual month's notice, or the master dismiss him the service for refusing to obey his reasonable orders, or for gross misbehaviour, it seems he cannot recover any thing: \*3 Stark. [\*960] Ev. 1766; *Atkin v. Acton*, 4 C. & P. 208. A departure, however, with the consent of the master would not deprive him of his wages for the time he served: *ib.* In an action for the price of a coat, which had been returned to plt., he must show that it was made according to the order: *Haydon v. Hayward*, 1 Camp. 180. So, a herald, in an action for making out the debt.'s pedigree, must adduce general evidence to show that it was made out according to the laws of heraldry: *Townsend v. Neale*, 2 Camp. 191. Where a ship was let to freight at a certain sum per month, to be paid on her final discharge, at the end of the voyage, and she was lost in the middle of her voyage, it was held that no action could be maintained for any freight: Abbott, 347, 8 East, 473; and so, where freight was to be paid on the ship's arrival at her first destined port, and she was lost before her arrival: 2 B. & A. 17; *ante*, 123. If a builder undertake a work of specified dimensions, and with specified materials, and deviates from the specification, he cannot recover upon a *quantum valebant* for the work, labour and materials, if the debt. has never acquiesced in such deviation by consenting to it, or adopting the same to his use: *Ellis v. Hamlen*, 3 Taunt. 52. In an action for work and labour, in curing a flock of sheep and lambs, consisting of 497, of the scab, it was proved that the plt. had declared that he did not expect to be paid unless he cured *all*, and it appearing that forty out of the flock were not cured,

it was held that he was not entitled to recover any thing: *Bates v. Hudson*, 6 D. & R. 3.

[Upon an entire contract—as, to repair a damaged chandelier and make it complete for 10*l.*—an action will not lie for the value of a partial repair, though such repair were beneficial to the defendant, and consisted partly in a supply of fresh materials, such materials not having been demanded back: *Sinclair v. Bowles*, 4 M. & R. 1; 9 B. & C. 92.]

On the other hand, if the contract be not entire, or, if entire, the deft. has disaffirmed it by acquiescing in its part-performance, and taking some benefit therefrom, on proof of that fact, plt. may recover, *pro tanto*, for the part performance, and as to the amount recoverable, see *infra*. Instances of this kind frequently occur where the plt. has deviated from the original contract, see *post*, 961; or where the plt. has not performed the work properly: *post*, 962.

The plt. should be prepared to prove that the work was done properly, according to the contract; as to how far he may recover, if it has been defectively performed, see *post*, 962.

A readiness to perform the work will be equivalent to a performance itself, so far as to recover, though, in such a case, plt. should declare specially. Thus, where a clerk, employed at a certain salary, payable quarterly, was discharged in the middle of a quarter, it was held, he was entitled to recover for the whole quarter: *Gandall v. Pontigny*, 1 Stark. 198. So, in an action by one who had contracted to serve for a stipulated time, as clerk or servant, it suffices to show that he was ready to render his service if called upon, although part of the time he was not employed: 2 Stark. 198. It has been held, that *indebitatus assumpsit* lies to recover for the schooling, &c., of the deft.'s son, in respect of a quarter which has elapsed after the son was removed from the school, a quarter's notice or a quarter's board being stipulated for, and no notice having been given: *Eardley v. Price*, 2 N. R. 333.

The destruction of work by an accidental fire, or other misfortune, before it is finished or delivered, does not deprive the workman of his right to remuneration to the extent of the work performed, unless the contract was entire, 3 Burr. 1592; or unless by the express and uniform custom of any particular trade, no payment is to be made, unless the work be completed and delivered: 1 Taunt. 137. An action lies for a shipwright for work and labour done and materials delivered in repairing a ship, though burnt in dock before the repairs are completed: *Menetone v. Athaves*, 3 Burr. 1592. A servant is entitled to recover for wages, although during part of the time for which he contracted to serve he was incapacitated from actual services by sickness: Cald. 298; 4 Burr. 332; 5 T. R. 657; *sed vide* 2 H. Bl. 606. And if a menial servant fall ill, and the master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between the master and servant that he should do so: *Sellen v. Norman*, 4 C. & P. 80.

In some cases, plt. may recover the price of work and labour, &c., although he has not performed it in any way, where such price [\*961] is to be \*paid before the work is done. Thus, if a person covenant to pay another £500 for teaching him a business, £250 on the 25th Feb. following, an action may be maintained for the second

£250, after the the 25th of Feb., without showing plt. taught deft. the trade: *Campbell v. Jones*, 6 T. R. 571. So, where A. contracts to build a house for B., and finish it on or before a certain day, in consideration of a sum of money, which B. contracts to pay A. by instalments, as the building shall proceed, the finishing the house is not a precedent to the paying the money, but the contracts are independent, and A. may therefore sue B. for the whole sum, though the building be not finished at the time appointed: *Terry v. Duntze*, 2 H. Bl. 389; *ante*, 122; and see 1 Saund. 320, b.; 12 Mod. 461; 10 East, 555.

*Price Recoverable.*] Where work is done under a special contract, and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is the rule of payment, so far as the special contract can be traced: and, for any excess beyond it, the party is entitled to his *quantum meruit*, according to the usual rate of charging: *Robson v. Godfrey*, Holt, 236; 1 Stark. 275, s. c. And, where a lessor contracted to pay his tenant, at a valuation, for certain erections, pursuant to a plan to be agreed on, provided they were completed in two months, but no plan was agreed on, and, after the condition broken, the lessor encouraged the lessee to proceed with the work, it was held, that the lessee might recover as for work and labour on an implied promise, arising out of so many of the facts as were applicable to the new arrangement: *Burn v. Miller*, 4 Taunt. 745. But, if a person contract to work by a certain plan, and that plan be so entirely abandoned that the original contract cannot possibly be traced, and it cannot be said to which part of the work it shall be applied, in such case the plt. will be permitted to recover as if no such contract had been made, and charge for the whole work done by measure and value: *Pepper v. Burland*, Pea. Rep. 103.

Where no specific price is agreed on, the plt. is entitled to recover a reasonable remuneration, according to measure and value, to be ascertained by a jury: 2 Camp. 45. Where a specific price has been agreed on, a subsequent promise to pay an additional sum for the same work, &c., is *nudum pactum*: Pea. Rep. 72; 1 Marsh. 567; 9 B. & P. 613. Where, in an action by a surveyor for his services, &c., he demands £5 per cent. on all money charged and allowed by him as surveyor to the different tradesmen, though evidence was offered that it was the uniform practice of surveyors to charge £5 per cent. on all monies allowed to the workmen, *Ld. Kenyon* held such demand exorbitant, and observed, that the plt. was entitled to a reasonable compensation for his labours, but was not to estimate that by the money laid out by the deft. in finishing his building, *Upsdell v. Stewart*, Pea. Rep. 193; and in another case, where a surveyor claimed £5 per cent. on the money laid out by him, as such, *Ld. Ellenborough* left it to the jury to say, whether this mode of charging was vicious or unreasonable; and, if they thought it was, to deduct accordingly: *Chapman v. De Tastet*, 2 Stark, 294; Chit. Cont. 175. As to what allowance an auctioneer is entitled to, see 1 Esp. Rep. 340. As to a broker's allowance, see 3 Chit. Com. L. 222, 2 Stark. 225; Holt, C. N. P. 412.

It seems that, if the plt. has furnished a bill, leaving a blank for his charges, and the deft. has paid a certain sum on account, the plt. as he made no specific charge, is bound by the sum so paid, and cannot recover more: 3 Esp. Rep. 192. The bill, when delivered, seems conclusive evidence

against the plt. as to an increase of any item charged in it, *Lee v. Jones*, 2 Camp. 496; and it is strong presumptive evidence against additional items; but, if there are any real errors or omissions, they may be explained and rectified: *Leveridge v. Botham*, 1 B. & P. 49.

[\*962] \*If the work has been defectively performed, the plt. cannot recover beyond the amount of the benefit actually derived by the deft. from the work and materials; and, where the work is so ill executed as to be wholly inadequate to the purposes for which it was intended, and the deft. has derived no benefit whatever from it, the plt. cannot recover at all: *Farnworth v. Garrard*, 1 Camp. 36; 3 Stark. Ev. 644, 1769. In the former case, deft. should not have permitted the plt. to have proceeded in the work, or, at all events, within a reasonable time after the execution of it, he should give plt. notice that he will not adopt the same: *Okell v. Smith*, 1 Stark. 107; 1 Camp. 190.

### *Evidence for Defendant.*

The evidence for deft., under the general issue, may consist in rebutting the plt.'s proofs as to the contract, *ante*, 957; the performance of the work, *ante*, 959; or the amount of the price, *supra*, 961.

The deft. may show that the plt. has been guilty of some misconduct or mismanagement in his work, so that thereby no benefit whatever has accrued to deft. from the plt.'s services, see instances as to agents and attorneys suing for their services, *ante*, 60, 163. Where a person undertakes, and is employed in performing, a work of skill and labour, and fails therein, so that his employer derives *no benefit* whatever from the work, the former is not entitled to recover any part of his demand, as the employer buys both his labour and his judgment, and he ought not to undertake the work if he do not know whether he can succeed or not: *Duncan v. Bhundell*, 3 Stark. 6; *Farnsworth v. Garrard*, 1 Camp. 38. And, though there be an agreement that a specific sum shall be paid for the performance of any work, the claim may be *reduced* by showing that the work or materials were of an insufficient and inferior description and value: *ib.* [If there were a special contract, and there is a count for work and materials as well as a special count, the defendant may prove the inferiority of the work and materials, and the plaintiff will only be entitled to recover on the common count for so much as the work and materials are worth: *Chappel v. Hicks*, 4 Tyr. 43; 2 C. & M. 214.]

If an auctioneer, employed to sell an estate, be guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor: *Denew v. Daverell*, 3 Camp. 451. If an engineer be employed, by a committee for erecting a bridge, and forming a road to it, to make an estimate of the expense, he is bound to ascertain for himself, by experiments, the nature of the soil, although a person previously employed by such committee, having made the experiments, give him, by their desire, information of the result: *Money Penny v. Hartland*, 2 C. & P. 378, *s. c.*; 1 *ib.* 352. If an engineer so employed, make a low estimate, and thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it, and it turns out afterwards that such estimate is incorrect, either from negligence or want of skill, and that the work cannot be done but at much greater expense, he is not entitled to recover any thing for making such estimate: *ib.*

It seems that, if there has been a specific price agreed on, and the deft. has, in any way, acquiesced and encouraged deft. in the improper work, and suffered plt. to perform it, the plt. may recover, and the deft.'s only remedy would be by cross action, see 1 Stark. 107; 1 Camp. 190; 3 Stark. Ev. 1770. And so, if the deft. has accepted a bill of exchange for the work, this defence is not available, though plt. seeks only to reduce the damages: 1 Camp. 40, *n.*; 2 *ib.* 346; 3 *ib.* 38; 14 East, 486; 3 Stark. 175. As to where plt. has substituted his own judgment, 3 Stark. 6. It is proper where the deft. intends to set up the badness or defective performance of the work or service, if not before done, to give the plt. notice thereof, in order to prevent the plt. being taken by surprise at the trial: *Basten v. Butter*, 7 East, 479; 3 Stark. 32. Where, however, the plt. rests his claim on a *quantum meruit*, such notice is clearly unnecessary: 1 Camp. 38.

\*The deft. may entitle himself to a verdict by showing the [\*963] plt.'s services were to be performed in an illegal transaction: 3 B. & C. 639; 5 D. & R. 542, *s. c.* But an agent may recover a remuneration for doing an act for his principal, which would be illegal if certain requisites were not afterwards complied with by the principal, as for obtaining an insurance on a voyage for which a license is necessary: 5 Taunt. 521; 3 Camp. 357. An action for work and labour cannot be maintained by a printer for printing and publishing a weekly periodical work, parts of which were printed on stamped paper, and distributed as newspapers, and parts on unstamped paper, which were half-yearly bound into volumes, unless such printer lodge an affidavit at the Stamp Office, or have his name and place of abode printed in some part of the publication, as required by the statute 38 G. 3, *c.* 78; *Marchant v. Evans*, 2 Moo. 14; and see *Bensley v. Bignold*, 5 B. & A. 335. A printer cannot recover for printing a work of a grossly immoral and libellous nature: 2 Stark. 107, and 4 Esp. Rep. 97. Plt. was employed to wash clothes for deft., who was a prostitute, knowing her to be such; the Court of C. P. held that the use to which the clothes might be applied could not bar plt. of an action for work and labour: *Lloyd v. Johnson*, 1 B. & P. 340. An action will lie on an agreement to procure a situation for a medical man, by the assignment of patents by a third person, *Edgar v. Blick*, 1 Stark. 464: but a contract to recommend customers is void: 4 Esp. Rep. 179; and see *ante*, 576-7. Deft. may show that plt. induced deft. to employ him by false and fraudulent pretensions of his skill: 2 Stark. 480; 2 B. & P. 378; *ante*, 90.

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WRIT.

EFFECT OF.] A writ of a court of record, when returned, is a record, and will have the same effect as any other record; as to which see, in general, *ante*, 611 to 613. When not returned, it is no record. A writ of supersedeas, reciting that a commission of bankruptcy issued on that day certain, is evidence to show that such a commission issued on that day: *Gervis v. Grand Western Canal Company*, 5 M. & S. 76. As the sheriff is a public officer, and the return to the writ is one of his official acts, credit is given to the statement upon his return. There can be no aver-

ment against his return in the same action, although a party in any other action, or in any action against the sheriff, may show that such return is false: *Dalton*, 190-1-2. The sheriff's return of a *devastavit* is not conclusive against an executor: *Gibson v. Brooke*, Cro. El. 859; and his return to a writ of *fi. fa.*, that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it, in an action for money had and received: *Cator v. Stokes*, 1 M. & S. 599. And, where the sheriff returns that the deft. is dead, the plt. may be received against his return; otherwise the suit would abate: *Vin. Ab. Return*, O. 22. And, although the party cannot aver against the sheriff's return, yet he may show that the person making it is not sheriff: *Arundel v. Arundel*, Yelv. 34.

And, even in another action, the return of the sheriff is *prima facie* evidence of the facts contained in it; as in an action for maliciously suing out a *fi. fa.*, after a sufficient levy, the sheriff returned that he had forborne to sell under the first writ, at the instance and with the consent of the then plt.; it was held, that these returns were *prima facie* evidence of such consent: *Gyfford v. Woodgate*, 11 East, 297. An examined copy of a writ returned and filed, and of the endorsement thereon, on which writ is endorsed, apparently by the sheriff's authority, the name [\*964] of the bailiff employed to make the levy, is not evidence \*to prove who was the bailiff so employed by the sheriff, evidence not being added that the endorsement of the bailiff's name on the writ itself was made by the sheriff's authority: *Hill v. Middlesex*, (*Sheriff*), 7 Taunt. 8.

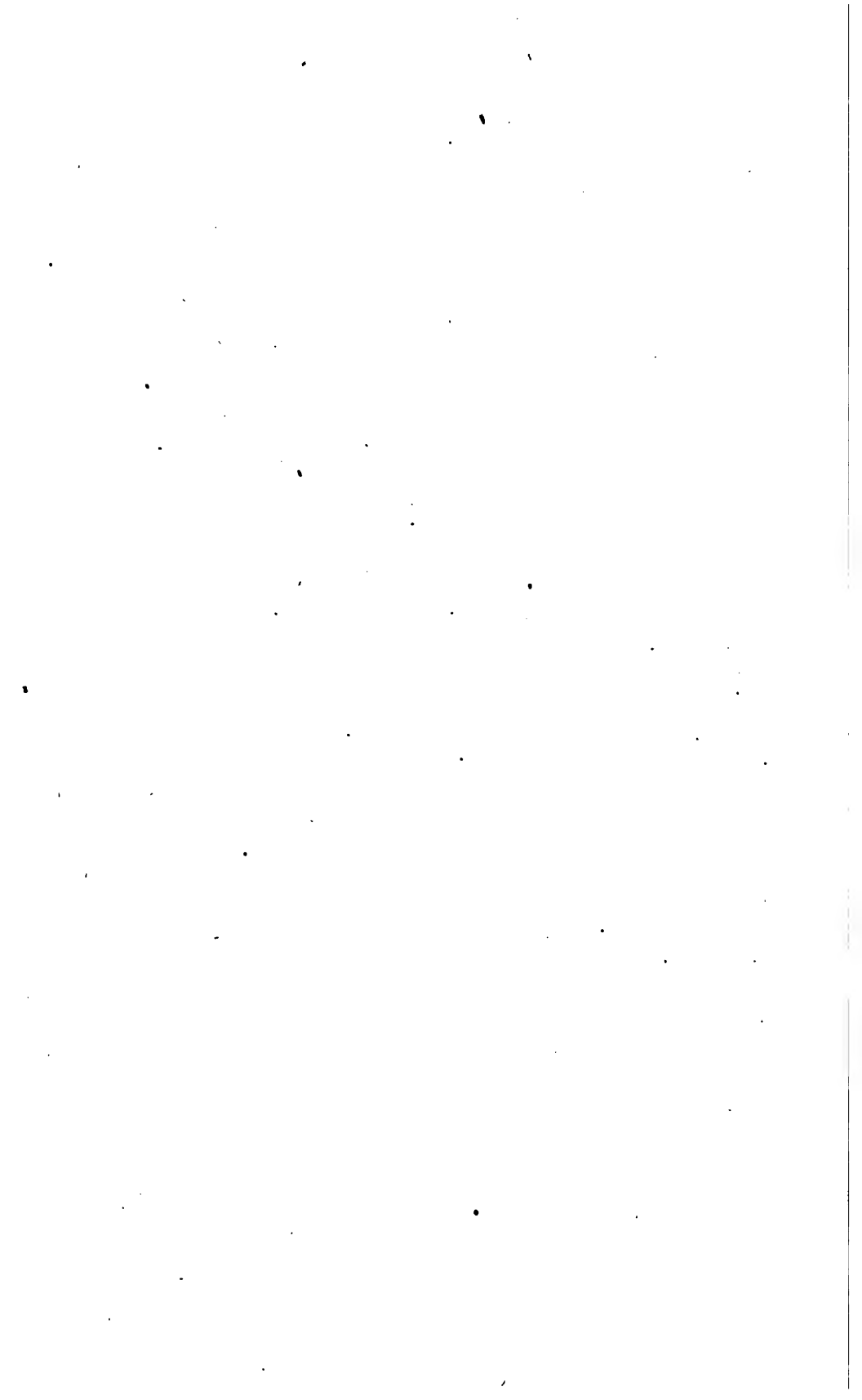
A bill of Middlesex, or *latitat*, may be treated either as the commencement of an action, or only as process to bring the deft. into court at the election of the plt.: *Tidd*, 9 ed. 146.

**PROOF OF.]** Where a writ has been returned, it is a record, and should be proved in the same manner as other records, by an examined copy: *ante*, 755. When not returned, the writ itself should be produced, and proved, B. N. P. 234; as, also, the fact of its not being returned, which may be ascertained by search at the Treasury. To prove that a writ issued in a particular cause, it is not sufficient to prove the præcipe by the filazer's book, and to give notice to the party to produce it; it should be shown, that after the return, the Treasury was searched, and no such writ found, and that it was in the party's hands who had notice to produce it: *Edmonstone v. Plaisted*, 4 Esp. Rep. 160; *Ellenb.* A copy of the judgment-roll, containing an award of an elegit, and the return of inquisition, is evidence of the elegit and inquisition: 2 M. & S. 565. Quære, whether, in order to prove the allowance of a writ of error, it be necessary to produce the original writ and allowance, or an examined copy thereof, or whether it be incumbent on the party to prove the service of such writ: *Cleghorne v. Desanges*, 3 Moo. 83. A party may always show the real time of suing out a writ, in opposition to the teste: 2 Burr. 950; 3 B. & C. 328; 5 *ib.* 149; 7 D. & R. 729; 7 B. & C. 406.

**How to prove the Commencement of the Action within a limited Time.]** Where action must be brought within a limited time, as in actions against magistrates, and penal actions, &c., the plt. must produce the writ, or an examined copy, at the trial, and prove that the action was brought



within the limited period, unless where it appears to have been so commenced, from the *nisi prius* record. And the production of the *capias ad respondendum*, in C. P., will be sufficient evidence: 3 Wils. 465. But, if the writ was not sued out till after the time prescribed, though within the time by relation, it will be insufficient: B. N. P. 195. Where there is but one writ, it may be given in evidence, without proving that it has been returned: 7 T. R. 6; 2 B. & P. 157; 4 Taunt 555; 6 *ib.* 142. And nothing but the writ need be produced, if the declaration appear on the face of the record to have been delivered or filed within the regular time allowed for declaring, as it is in that case sufficiently connected with the writ; but, otherwise, evidence must be given to connect them: *Hutchinson v. Piper*, 4 Taunt. 555. And, where the issue in C. P. is made up of a term subsequent to that allowed by the rules of the court, plt. must prove that the declaration was delivered or filed within that time: 6 Taunt. 141; 1 Marsh. 497. When there are two writs, it will be presumed that the plt. proceeded on the last, unless he connect them by showing the first to have been returned, 6 T. R. 617, 2 B. & P. 157, 14 East, 491; as otherwise, the court is not in possession of the cause, so as to award an *alias* or *pluries* for bringing the deft. into court: 7 Mod. 3; 1 Lutw. 260. But, if the debt was paid after a *pluries* writ issued, the deft. will not be allowed at the trial to object, as a ground of nonsuit, that the *latitat* was not returned: 7 East, 536. Where one writ was produced at the trial, and three declarations against the principal and his bail, to show that certain actions had been brought against them, and three *allocaturs* of the costs taxed in the same actions were also put in and proved, it was held to be sufficient proof of three actions having been brought, and of the costs having been taxed therein: 11 Price, 235, 250, 270-1; see Tidd, 9 *ed.* 162-3. The sheriff is in general concluded by his own return, and \*the bailiff [\*965] of a liberty is also concluded by the sheriff's return; and, if false, his remedy is against the sheriff: *Shaw v. Simpson*, 1 Raym. 184. A return to a writ, by a sheriff, is sufficient proof of the delivery of a writ to him: *Fenton's case*, Lofft, 524. The return, purporting to be made by a lord of a manor, to the sheriff's mandate, to levy under a writ of *fi. fa.*, is *prima facie* evidence that the person whose return it purports to be is the lord of the manor: *Tyler v. Leeds*, (*Duke*), 2 Stark. 218. But, where the sheriff returned to a *fi. fa.*, that he had levied goods, and a commission of bankrupt issued against the deft., on an act of bankruptcy committed before the delivery of the writ to the sheriff, which goods the sheriff gave up to the assignees, it was held, that he was not bound by his return, but might show those facts in action brought against him for not selling the goods under a *venditioni exponas*: *Brydges v. Walford*, 6 M. & S. 42; 15 East, 78. But the sheriff's officer, for the purposes of his own justification, is not concluded by a false return of the sheriff: *Parker v. Moose*, Cro. El. 181.



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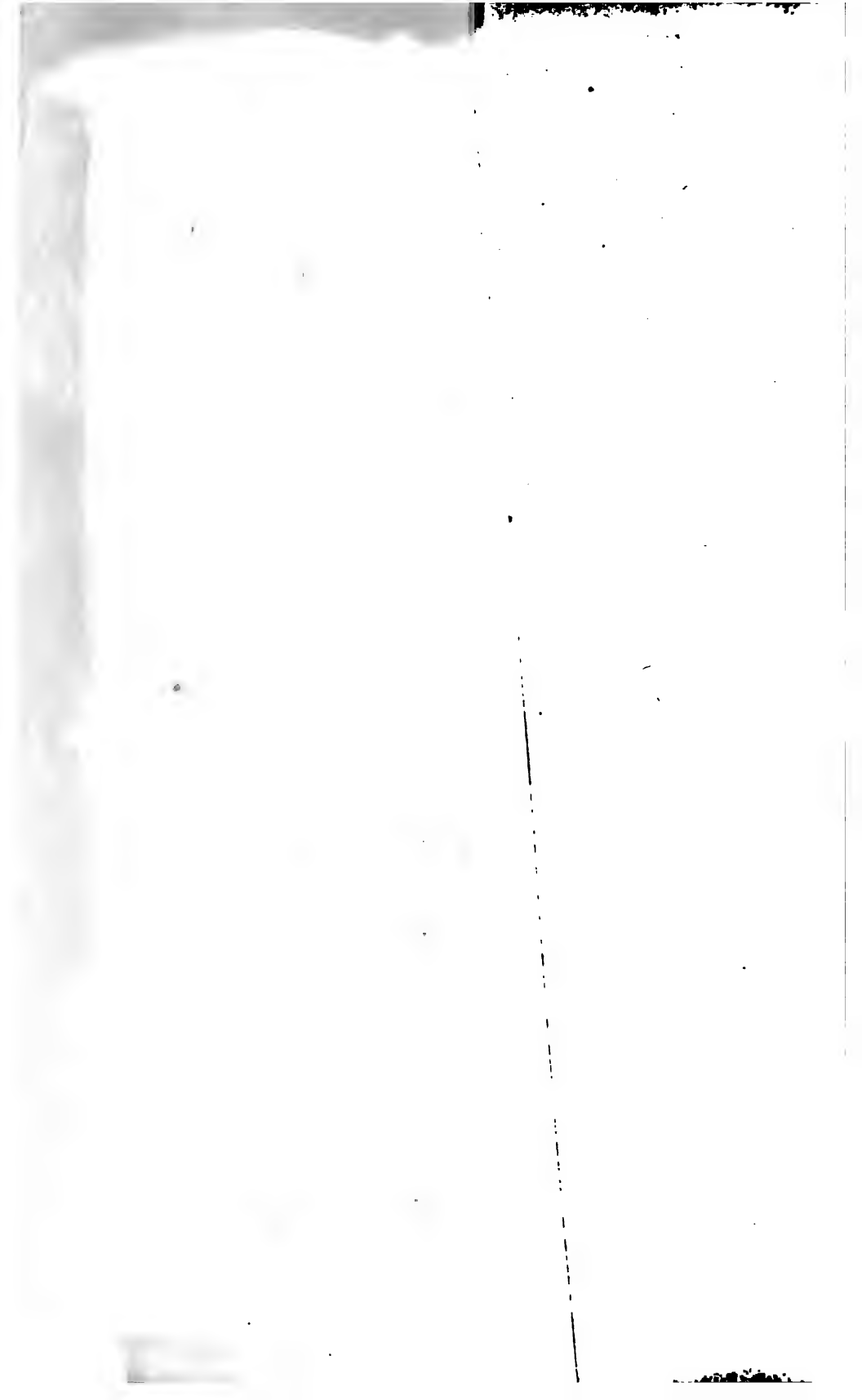
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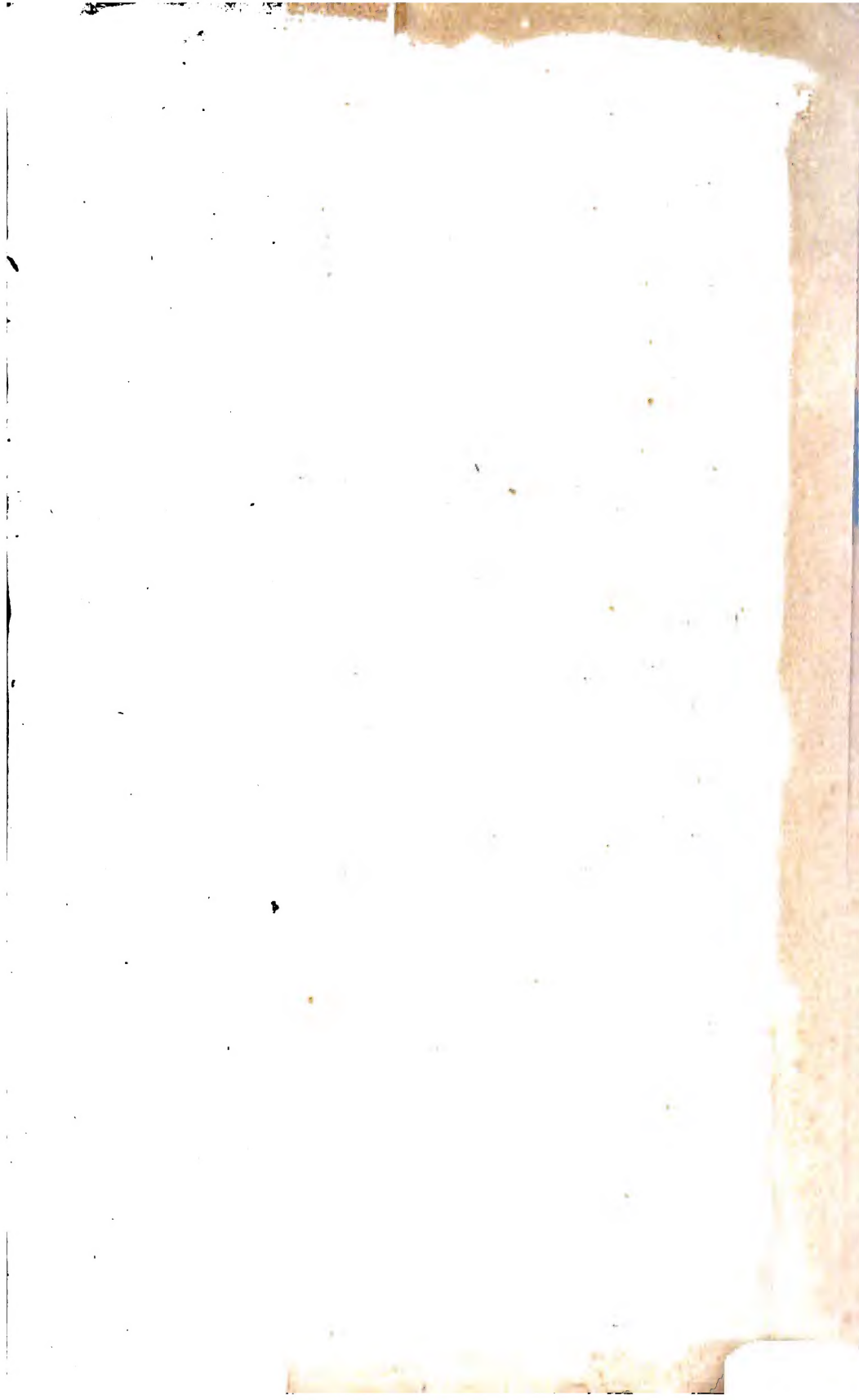
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